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JULY, 1904, TO DECEMBER, 1905.

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DOUGLAS M. BUCHANAN, M.A.,

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JUDGES OF THE SUPREME COURT

ASSIGNED TO THE

COURT OF APPEAL.

Sir J. H. de Villiers, P.C., K.C.M.G., Chief Justice.

Sir E. J. Buchanan, Justice (Acting Chief Justice, May–October, 1905).

C. G. Maasdorp, Justice.

W. M. Hopley, Justice.

J. G. Kotzé, Judge Resident, E.D. Court.

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PART IV.

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CAVE'S IMPERIAL BREWERY *vs.* THE CAPE GOVERNMENT RAILWAYS.

Railway Carrier.—Recovery of Underpaid Freight.—Contract.

Goods were sent by rail from Port Elizabeth to Bulawayo at rates as per printed tariff, the exact amount not being specified beforehand, freight to be paid at destination. On arrival of the goods at Bulawayo the railway clerk by mistake made out an account at a rate lower than the tariff allowed on the class of goods carried. This account was paid by the consignee, and the goods were delivered to him. On the error being discovered the balance of the correct amount was claimed. Held,—*in the absence of evidence to show that the consignee's position had in any way been altered for the worse by the mistake, that the consignee was liable for the unpaid freight.*

Wiggins *vs.* Colonial Government (16 S.C. Rep., p. 425) *discussed and distinguished.*

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This was an appeal from the High Court of Southern Rhodesia.

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The Commissioner of Public Works, on behalf of the Railway Department of the Cape Government, in the Court of the Resident Magistrate for the district of Bulawayo, sued the defendant company for the sum of £51 4*s*. 3*d*. (reduced to £50 to bring the claim within the jurisdiction of the Court), being the balance of carriage of certain drums of extract of malt carried by rail from Port Elizabeth to Bulawayo. Alternatively the summons stated that at the request of the defendant the plaintiff conveyed from Port Elizabeth to Bulawayo the said drums of extract of malt and delivered the same, and by error undercharged the defendant £51 4*s*. 3*d*., the plaintiff's officers and employees in Bulawayo having in error charged the defendant 12*s*. 7*d*. per 100lb. for carriage instead of 16*s*. 1*d*., the proper legal and tariffed charge therefor, the defendant being well aware of the said error.

The defendant pleaded, first, not indebted; and then specially that the said goods were delivered to the plaintiff for carriage from Port Elizabeth to Bulawayo on the condition that the plaintiff would charge the defendant for such carriage on arrival at Bulawayo. That on arrival in Bulawayo the plaintiff charged the defendant for such carriage £29 8*s*. 11*d*., £55 1*s*. 7*d*., £99 12*s*. 5*d*. respectively for the three consignments mentioned in the particulars annexed to the plaintiff's summons, and that the defendant paid the said sums and the said contracts were thereby concluded. That the said amounts were fair and reasonable, and the defendant was not aware and had no means of knowing that the rates charged by the plaintiff were not the ordinary current rates. That at the time the defendant paid the said amounts he relied on representations made to him by the plaintiff, his servants, or agents, that the said amounts were the ordinary current rates for conveyance for that class of goods from Port Elizabeth to Bulawayo. That the plaintiff, his servants, or agents, accepted the amounts so paid by the defendant as aforesaid in full satisfaction and discharge for the carriage of the said consignments of goods respectively. For a further plea, in case the above plea should be overruled, as to £27 14*s*. 2*d*. parcel of the amount claimed being the last item mentioned in the particulars of the plaintiff's claim, the defendant

says that his agents specially contracted and agreed with the agent of the plaintiff for the conveyance of that consignment at owner's risk and undamageable rate and the plaintiff accepted such consignment and carried it in pursuance of such contract at such rate being 12*s.* 7*d.* per 100lb. And for a plea to the alternative claim the defendant says that the error alleged as having been made by the plaintiff's officers and employees was not a *justus error*, as it was the duty of the plaintiff, his servants and agents to know what rate to charge, and they having such knowledge charged the 12*s.* 7*d.* rate.

The plaintiff replied, admitting that the three amounts stated in the plea were charged, but said they were charged in error, and that the defendant paid same, but denied that the contracts were thereby concluded; and again said that the defendant is indebted to him for the under-charges set forth in his account annexed to the summons. As to defendant's special plea with reference to the item of £27 14*s.* 2*d.*, plaintiff denied the alleged special contract and agreement, but, on the contrary, said some of the drums of malt extract were damaged, and damages claimed by defendant, which were duly paid. Otherwise the plaintiff joined issue on the pleas.

The Magistrate, in his judgment, set forth the following as a compendium of the facts proved :—

In 1902 defendant got consignments of extract of malt up and paid various rates. There is nothing to show what he paid. In June, 1903, he commenced getting extract of malt again. He got four lots in all, on the first, third, and fourth being charged 12*s.* 7*d.*, on the second 16*s.* 1*d.*, whereupon he became aware that there was a mistake somewhere. He paid the higher rate but claimed a refund, which, using his own words, "I have abandoned as I am assured it is the correct rate." Again, the defendant, who gave his evidence most fairly throughout, states that, at an interview which took place at the railway station, he admitted that the railway department appeared to be in the right; in this I quite concur. It seems clear from reference to tariff books and various sections quoted, that 16*s.* 1*d.* is the correct rate. It has been argued that the words that appear on the consignment notes, "undamageable," "owner's risk," and the lettering "O.R.," on one or the other, constitute an agreement by the railway department to carry goods, which should be charged second-class rate (16*s.* 1*d.*) at the third (12*s.* 7*d.*); but there is nothing to indicate that these words were placed on the documents by the railway department; indeed, the only evidence on the point is that of Mr. Bisset, who thinks

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not. To my mind the position taken by the railway department is a very fair one; it is that the object of consignors trying to get goods conveyed at owner's risk is to obtain the lower rate, and that certain classes of goods are refused at owner's risk, the railway charging the higher rate and assuming the responsibility. As regards these goods being undamageable, it is clearly shown by the amounts paid for damages that it must have been a fairly easy matter to damage them, and that in spite of the words "owner's risk" compensation was claimed and paid. The defendant states: "As far as I know all consignments were sent in the same way, without any special agreement," but as is shown on the back of the consignment notes, his agents specially agreed that the goods were to be received, conveyed, and dealt with in accordance with the terms, etc., of the tariff book, with which they acknowledged they were acquainted.

The Magistrate gave judgment for the plaintiff, as prayed. From this decision defendant appealed to the High Court, when the Presiding Judge (VINTCENT, J.) dismissed the appeal. His Lordship's reasons set forth:

It has been candidly admitted by appellants that the rate for carriage of extract of malt as per tariff book is 16*s.* 1*d.* per 100lb. It is clear with regard to one consignment that appellants after demur and inquiry paid carriage at the rate of 16*s.* 1*d.* per 100lb., and that they claimed and received payment from respondents of a certain sum for damage done to some of the drums consigned to them by their agents at Port Elizabeth.

In the Court below the respondents produced in respect of two of the consignments—viz., of 52 and 174 drums respectively, consignment notes received by them from appellants' agents at Port Elizabeth when the goods were delivered for conveyance to Bulawayo. On the note as to the 174 drums there is on its face stamped an endorsement, "undamageable, owner's risk"; on the other note, on its face, is endorsed "O.R.," which, it is admitted, means "owner's risk." I take it that these endorsements were made by the appellants' agents. On the consignment note relating to 126 drums, and produced by appellants, there is no mention of "undamageable" or "owner's risk." On the back of each of these notes there is an endorsement signed by appellants' consigning agents as follows:—

"We hereby specially agree that this consignment is to be received and to be conveyed and dealt with in accordance with the terms and conditions and regulations published in the official tariff book in force at this date, with which we acknowledge ourselves to be acquainted."

It is clear from the tariff book that extract of malt does not come under the list of goods which, in the absence of any special contract, are carried at the "owner's risk," or "undamageable" rate—viz., at 12*s.* 7*d.* per 100lb. The tariff charge for extract of malt is 16*s.* 1*d.* per 100lb.

Appellants' manager, in his evidence, stated that he did not consider that the amount of the rate was settled at Port Elizabeth, but that the same was to be in accordance with the tariff demand at Bulawayo. It is clear from his evidence that if 16*s.* 1*d.* per 100lb. had been charged by respondents on delivery at Bulawayo of the consignments the subject matter of this suit, he would have paid the same; in fact, on one consignment, not the subject of this suit, he actually paid at the rate of 16*s.* 1*d.* He further stated that even if the drums had been consigned to his knowledge at "owner's risk" or "undamageable" rates, he would nevertheless, in the event of damage done to them *en route*, have claimed and expected compensation.

In these circumstances had the respondents the right to claim from appellants the difference between what was paid and what is admittedly the true rate.

Reference has been made to the case of *Wiggins* vs. *Colonial Government* (16 Juta, p. 425), the head-note of which is as follows:—

"The consignor of goods by railway who has paid the freight demanded by the proper railway official (which, owing to a mistake for which such official was alone responsible, was less than the tariff rate), and would not have been sent if the tariff rate had been demanded, cannot, after the goods have been forwarded to their destination, be compelled to pay the difference, notwithstanding that the law prohibits any reduction of rates in favour of any person using the railway."

In my opinion this case does not assist the appellants, for the facts in Wiggins' case seem to me to be entirely different from those in the present case. In the former case it is clear that the goods would not have been delivered for conveyance had the correct rate been disclosed at the time of negotiations. Wiggins sent the goods on the distinct statement that the goods would be carried at the rate mentioned by the railway clerk. In this case can it be said that there was a contract at Port Elizabeth to convey at the 12*s.* 7*d.* rate in view of the endorsement on two of the consignment notes, "undamageable," "owner's risk," and of the fact that on all the notes there is an undertaking on the part of appellants' agents to pay carriage according to tariff rate, and that the goods are to be conveyed according to the rules and regulations published in the tariff book, with the contents of which they acknowledge themselves to be acquainted?

I have come to the conclusion that in the above circumstances the appellants must be taken to have agreed to pay, despite the endorsements "undamageable," "owner's risk," what was the proper legal charge—viz., 16*s.* 1*d.* In my opinion the fact of 12*s.* 7*d.* only being charged and paid in Bulawayo on delivery did not prevent the respondents from claiming the difference between this rate and the 16*s.* 1*d.* rate. I consider that inasmuch as appellants claimed and received payment for damage done to some of the drums, the defence of want of *justus error* cannot avail.

In the absence of clear proof that there was a contract at Port Elizabeth to convey the goods at the rate of 12*s.* 7*d.* per 100lb.; in view of the endorsements on the back of the consignment note signed by

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appellants' agents admitting acquaintance with the contents of the official tariff book and of the fact that damages were claimed and paid for injury to some of the drums, I am of opinion that the Magistrate arrived at a correct decision.

Assuming that importance must be attached to the endorsements on two of the notes of the words "undamageable," "owner's risk," "O.R.," I find it difficult to arrive at the conclusion that the respondents are now estopped from claiming the true rate. It seems clear that these endorsements were not made by the respondents, but by appellants' agents with an admitted knowledge of the contents of the tariff book; a representation that the goods were "undamageable," a representation in all probability innocent, but nevertheless false, and a representation which may well have induced the respondents' servants to charge at Bulawayo the lower rate. Under all the above circumstances the appeal must be dismissed with costs.

Schreiner, K.C. (with him *McGregor*), for the appellant company, while admitting that the sum of 16*s.* 1*d.* would be the proper charge, according to the tariff book of the railway, for the carriage of extract of malt, contended that the circumstances did not disclose such a *justus error* as would entitle the plaintiff to succeed in an action. *Ignorantia facti* was not a ground for restitution where a transaction was concluded. Here the contract was executed and the carriage demanded paid (*Voet*, 22, 6, 6 & 7; *Divisional Council of Aliwal North* vs. *De Wet* 7 Juta, 232; *Logan* vs. *Beit*, 7 Juta, 197). The facts in *Wiggins* vs. *Colonial Government*, 16 S.C. Rep., 425, were stronger than in this case, for there there was a distinct contract, but the principle was the same. Statements by the clerk of a carrier bound the carrier (*Kerr on Fraud and Mistake*, 3rd ed., p. 440; *Duke of Beaufort* vs. *Nield*, 12 Cl. & Fin., 248; *Storey's Eq. Juris.*, sect. 151; *Pothier on Contracts*, vol. I., p. 129, sect. 118; *De Vos* vs. *Bourhill*, 5 Searle, 257; *Winkfield* vs. *Packington*, 2 Car. & Payne, 599).

Howard Jones (with him *Nightingale*), for the respondent, urged that the contract was to carry according to tariff. The clerk's mistake was not a gross or careless one, but arose from the goods being wrongly marked as being at owner's risk. Only those goods so specified in the tariff book would be carried at owner's risk, and extract of malt was not included in the list. No receipt was given, but even a receipt would not have estopped

the railway. *Wiggin's* case was quite different from the present one.

Schreiner, K.C., in reply, cited *McCance* vs. *L. & N.W. Ry. Co.*, 7 Hur. & Nor., 477.

Cur. adv. vult.

Postea (July 26),—

DE VILLIERS, C.J., in delivering judgment, said: It is clear from the evidence in this case that on the arrival of the drums of extract of malt in question at Bulawayo, the plaintiff's officials there made an undercharge for the freight due for conveyance by railway from Port Elizabeth. The freight legally chargeable was 16*s.* 1*d.* per 100lb., whereas the rate charged was 12*s.* 7*d.* per 100lb. The drums were delivered to the defendants, but no receipt was given to them for the amount paid. An action was subsequently brought by the Commissioner of Public Works in the Resident Magistrate's Court for the difference of freight, and alternatively for relief against the mistake committed by the railway officials at Bulawayo, and judgment was given in favour of the plaintiff. On appeal to the High Court of Southern Rhodesia, that Court dismissed the appeal, and the defendants now appeal to this Court against the judgment of the High Court.

The case has been argued on behalf of the defendants as if a discharge from further liability for freight had been given by the railway officials to the defendants, but, as I have already remarked, no receipt of any kind was given. Reliance is, however, placed on an admission made by one of the plaintiff's witnesses at the trial that the defendants would not have obtained delivery of the goods if they had refused to pay the freight demanded. This admission does not show that the acceptance of the freight and delivery of the goods constitute a complete discharge from all further liability in respect of freight. Unless there were such a discharge there is no reason in law why the plaintiff should not, on discovery of the mistake, claim the balance of the freight owing on the

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goods. But, assuming that the transaction constituted a discharge, the question would still remain whether the plaintiff is entitled to be relieved against the mistake which was undoubtedly made by his officials. Mr. *Schreiner* admits that it was a mistake of fact, but he contends that the mistake was so gross that the plaintiff cannot avail himself of it. I cannot agree to this view. The classification of goods like extract of malt is by no means a simple matter, and a mistake like the one in question might easily be made in the press of work by the most careful official. The mistake made by the clerk in the case of *Wiggins* vs. *Colonial Government* (16 S.C., 425) was of a different nature. There the clerk charged for melons not placed in any receptacle as if they had been placed in bags, and the tariff book clearly indicated what charge he ought to have made. In the present case the tariff book was not equally clear. It is said that if the tariff book is obscurely worded, the department ought to suffer for the obscurity. No evidence, however, was given on this point, and, in the absence of such evidence, I am not prepared to decide that it would have been possible to make the tariff so clear as to obviate any possible mistake. There is this further difference between the case of *Wiggins* vs. *Colonial Government* and the present case, that there the consignor was induced by the clerk's mistake to send goods by train which he would otherwise not have sent; whereas in the present case there is no proof whatever that the defendants' position was in any way altered by the mistake. If, for instance, it had been proved that in consequence of being charged freight at the lower rate, they had sold the extract of malt at a lower rate than they otherwise would have done, there would have been fair ground for holding that relief should not be granted. In the absence, however, of any evidence to show that the parties cannot be reinstated in the positions in which they would have been if the proper charge had been made and paid, I am of opinion that the Courts below correctly decided in favour of the plaintiff. The appeal must therefore be dismissed, with costs.

BUCHANAN, J.: It appears to me that this case may be

dealt with by looking at the contract entered into by the parties. That contract was for the carriage of certain goods by train from Port Elizabeth to Bulawayo at the rates fixed by the printed railway tariff, which rates the duly authorised agent of the appellants, at the time he made the contract, declared in writing that he was acquainted with. The carriage was not paid in advance, and when the goods reached their destination a railway clerk in error made out an account charging the freight at 12*s.* 7*d.* per 100lb. instead of at 16*s.* 1*d.* Another railway clerk made out an account for similar goods conveyed about the same time at the correct rate, and both these accounts were paid by the consignees. I do not think there has been anything disclosed which ought to prevent the error of the clerk from being rectified, or to bar the railway authorities from recovering the true amount which by the contract the consignees, through their agent, undertook to pay them for the conveyance of these goods. I concur, therefore, in dismissing the appeal.

DE VILLIERS, C.J., said that Mr. Justice HOPLEY also concurred in the judgment.

Appeal dismissed accordingly, with costs.

[Appellants' Attorneys, WALKER & JACOBSOHN.
Respondents' Attorneys, REID & NEPHEW.]

REX *vs.* BOTHA.

Act No. 35, 1893.—*Jurisdiction of Circuit Court.*

Act No. 35, 1893, *does not diminish the jurisdiction of the higher Courts, but increases the jurisdiction of the Magistrate, as well as facilitating proof in cases of stock thefts. Therefore, though an indictment should charge theft of stock in contravention of Act No.* 35, 1893, *upon conviction before a Circuit Court the Judge is not restricted in his sentence to the limits fixed by section* 7 *of the Act, that section applying only to trials in the Magistrate's Court.*

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The accused was tried and convicted at the Circuit Court, held at the Umtata, before KOTZÉ, J., and a jury, on an indictment charging the crime of theft in contravention of Act No. 35, 1893; and was sentenced to four years' imprisonment with hard labour.

Upon the application of prisoner's Counsel, the presiding Judge reserved the following point for the consideration of the Court of Appeal in criminal cases—viz. :—

"Whether, inasmuch as the prisoner Botha was indicted and charged with the crime of theft in contravention of the provisions of Act No. 35, 1893, and found guilty, he could be sentenced to a greater punishment than that provided by section 7 of the said Act?"

Rainsford, for the accused, submitted that as the prisoner was convicted of a crime in contravention of an Act of Parliament, he could not be sentenced to a greater punishment than that specially provided for in the Act itself. (*Magistrate's Cases Reviewed*, Buch. S.C. Rep., 1879, p. 288.) The 7th section of Act No. 35, 1893, fixed the maximum imprisonment for stock thefts at one year in the case of first convictions, and two years on subsequent convictions.

Howell Jones, for the Crown, was not called upon.

DE VILLIERS, C.J., said: The Act No. 35, 1893, has a two-fold effect. It increases the jurisdiction of Resident Magistrates, and it facilitates proof in cases of stock theft; but there is nothing in the Act from which it can be implied that there was any intention on the part of the Legislature to reduce the powers of the Judges in the infliction of punishment. That the higher Courts were intended to retain their existing jurisdiction is perfectly clear. The 20th section provides that when, in the course of any trial under the Act in the Magistrate's Court, it shall appear to the Resident Magistrate that the case is one which, from its nature or magnitude, is unfit to be disposed of under the limited jurisdiction conferred by the Act, it shall be lawful for such Court to stop the trial, and to turn the proceedings into a pre-

paratory examination. This section clearly shows that there might be cases in which the Resident Magistrate's jurisdiction would not be sufficient to meet the requirements of the case, and that the jurisdiction of the higher Courts would have to be called in, so that an adequate sentence should be imposed. The 7th section is confined to trials in the Magistrate's Courts, and limits the jurisdiction of the Magistrate, but it does not take away any powers vested in the higher Courts, which are not mentioned at all in the section. Where it is necessary to confer any additional power on the higher Courts they are specifically mentioned. Take, for instance, the 24th section, where it is made lawful for any Judge or Magistrate imposing a fine to order further imprisonment in case of non-payment. Such a power a Judge might not have under his ordinary jurisdiction, and therefore it was necessary to mention a Judge specially in regard to the power conferred by that section. The 7th section does not mention the higher Courts, and the powers which those Courts possessed remained undisturbed. In this case the charge was one of theft, and the addition of the words in the indictment " in contravention of Act No. 35," etc., might be treated as surplusage. There was ample evidence in support of the charge of theft quite independently of the provisions of the Act as to the onus laid upon a person found in possession of certain property to satisfactorily account therefor. But, even if there was not, there is nothing in the Act to diminish the jurisdiction possessed by the higher Courts. The point reserved must therefore be decided in favour of the Crown.

BUCHANAN, J., and HOPLEY, J., concurred.

Question reserved answered accordingly in favour of the Crown, and conviction and sentence confirmed.

HEYDENRYCH *vs.* JEFFERY.

Promissory Note.—Place of Payment.—Agent.

A promissory note was, in the body of the document, made payable at the office of one S., a broker and financial agent. On the due date the holder presented the note at S.'s office, when S., on behalf of the maker, asked for a fortnight's grace, which was granted. Before the expiration of the fortnight the maker paid the amount of the note to S. at his office. The payee had retained possession of the note, and, though afterwards he repeatedly demanded payment from S., he never received the money. Some months after S. absconded, and his estate was sequestrated. Held,—*that the holder was entitled to recover from the maker, notwithstanding the payment of the amount by him to S.*

Per DE VILLIERS, C.J.: *The fact that the note had been made payable at the office of S. would be a link in the chain of evidence to prove S.'s agency to receive payment for the holder; but standing by itself was not sufficient to prove such agency. The note could only be discharged by payment to the holder, and, as S. had not the note in his possession, the burthen of proving his authority to recover the money lay on the maker.*

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This was an appeal from the decision of BUCHANAN, J., in an action upon a promissory note made by the respondent in favour of the appellant, heard in a Divisional Court.

The facts of the case are fully set forth in the judgments given below. The Presiding Judge, in his reasons, said:

Provisional sentence was prayed last September upon two promissory notes, both in favour of the plaintiff, when the cases were heard together by the Judges then sitting. One was the case of Heydenrych against Hector, and the other was the case of Heydenrych against Jeffery. In both these cases the money had been received through one Scott upon promissory notes given by the defendants to Heydenrych, the plaintiff. Scott's agency was relied upon in both

cases. In the case against Hector, the parties were ordered to go into the principal case. In the case against Jeffery, provisional sentence was refused absolutely. The case of Heydenrych *vs.* Hector came for trial in the principal case before me recently. It was found that Hector had seen Scott, who raised the money from Heydenrych, to whom Hector gave the promissory note, payable at Heydenrych's office. Afterwards Hector, through his attorneys, paid Scott the amount borrowed, but did not obtain back the promissory note. I held in that case that, though Scott negotiated the transaction for both parties, and was to some extent the agent for both parties in raising the loan, he was not the agent of Heydenrych to receive the money from Hector, and consequently judgment was given against Hector. To my mind the present case differs from that one. Here Heydenrych knew nothing of the debtor, whom he had never seen, and with whom he had had no communication, but dealt with him through Scott. Instead of making the note payable to himself at his own office, he accepted the note made payable at the office of Scott. He thus intimated to the debtor that Scott had authority to receive payment on Heydenrych's behalf. On the day before the due date, Heydenrych, at Scott's request, allowed fourteen days' further time to be given, and on the date when the note was to be paid, according to this later arrangement, the defendant brought his money and paid it into the office of Scott. This case, therefore, differs from that of Hector. In Hector's case the defendant did not perform his contract; in this case the defendant had performed his contract. He undertook to pay the amount at Scott's office, and he did so. He carried out strictly the tenour of the note—viz., to pay the £105 at Scott's office on the due date. But in this case there might even be a further defence on the equities. The defendant gave a power of attorney, which Heydenrych said was to enable him to pass a bond to cover this advance. Heydenrych afterwards returned this power and the title-deeds to Scott, treating him as his representative in this matter. He also received from Scott a guarantee that Scott would see that the amount was paid out of the loan to be raised for the defendant on bond. A loan was raised, and the amount of the note was paid to Scott, at Scott's office, on the 29th November, 1902. Then, again, the plaintiff made no demand upon the defendant for the amount of the note until nine months after the due date—until nine months after it had been paid. And the plaintiff only came upon the defendant for the amount after Scott had absconded and Scott's estate had been sequestrated. In these circumstances, even if the defendant had not so strictly performed his contract, as he had done, there would be considerable ground in equity for saying that plaintiff was now estopped from recovering from defendant. But it is not necessary to decide this point. Mr. Heydenrych says he never parts with his notes until he receives the money, even when they are made payable at a bank. Now, supposing the maker of a note had undertaken to pay at a certain bank, and, when that note became due he went and deposited the money at the bank to meet the note, and that some time afterwards, before the holder got the money from the bank, the bank stopped

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payment, would not the loss be that of the holder of the note? If Heydenrych had only inquired from the defendant in due time, he would have found that he had paid the money at Scott's office. This case differs so materially from the case of Hector, that I think the judgment in Hector's case does not govern this case. In this case, I have no doubt whatever that judgment must be for defendant, with costs.

Burton (with him *J. E. R. de Villiers*), for the appellant plaintiff below, submitted that the issue depended solely on the fact whether the place of payment being specified in the note, payment at that place to Scott was or was not a payment to the payee. The place was specified for the convenience of both parties, but the promise was to pay Heydenrych or his order. The payment was not made to Heydenrych, and there was no authority given by him to Scott to receive the money on his behalf. Scott had not the note in his possession, but promised to obtain it and send it to the maker. If he was the agent of either party, he was rather the agent of Jeffery than of Heydenrych. (*Story on Agency*, sects. 98, 104; *Curtis* vs. *Judd*, 1 Molloy, 487, I.R.; Mew's Digest, 11, p. 1025; *Chitty on Bills*, 11th ed., pp. 276–278; Bills of Exchange Act No. 19, 1893, secs. 82, 86, & 87; *Story on Promissory Notes*, 5th ed., secs. 375, 243, and sec. 228, note, p. 293.)

W. P. Buchanan (with him *M. Bissett*), for the respondent and defendant, urged that it was the duty of the creditor to seek out his debtor. Where a place of payment was specified the creditor must present at such place, and payment there was all that was required from the debtor. No English cases could be found in point, but there were several American decisions which supported the defendant. (*Story on Notes*, sec. 228, note; *Lazier* vs. *Horan*, 37 Am. R., 736, also 39 Am. R., 167; *Bank of Charlestown National Banking Association* vs. *Zorn*, 37 Am. R., 733; *Byles on Bills*, p. 298.) As to the equities, the loss was the result of the delay on the part of Heydenrych in not making any demand on the maker for several months until after Scott had absconded. As he had charged at the rate of 60 per cent. per annum for the loan, his delay was only to be explained from the fact that he looked to Scott for the money.

Burton replied.

Cur. adv. vult.

Postea (August 29),—

HOPLEY, J., in giving judgment, said: In this case the following facts seem to me to be clearly established by the evidence taken at the trial: In October, 1902, the respondent was in want of money, and approached one Scott, a land and estate agent, who also apparently made it part of his business to raise loans for clients from money-lenders, with a view to obtaining a loan upon the security of some landed property owned by him, and for that purpose he handed to Scott his title-deeds, no doubt with the necessary power of attorney to pass the mortgage, which was to be for the sum of £1,500. On the 14th October, the loan had not been raised, and the respondent was then in urgent need of £100 to meet pressing liabilities. This fact he made known to Scott, who then approached the appellant, a money-lender, with an application for a loan of £100 for one month, on the understanding that part of the £1,500 to be raised would be applied in payment thereof, and that a promissory note for £105 would be given by respondent. As security for this temporary accommodation Scott placed in the appellant's hands the title-deeds or transfer papers relating to the property in question, together with a power of attorney, which must have been a power signed by the respondent authorising the appellant to raise a mortgage of £150 on the property to secure the payment of the promissory note. On these conditions appellant consented to advance his money, and Scott then brought him from the respondent the note in suit, which is in the following terms:

"Due 15th November, 1902.
"No. 223.
"Cape Town, 15th October, 1902.

£105 0*s*. 0*d*.

"On the 15th day of November next I promise to pay to B. G. Heydenrych, or Order, at James Scott's office,

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10, St. George's Hotel Chambers, St. George's Street, Cape Town, the sum of One Hundred and Five Pounds sterling, value received.

"T. Jeffery."

Thereupon appellant handed Scott the following cheque:

"No. 192. 154,639.

"Cape Town, 15th October, 1902.

"African Banking Corporation, Ltd., Cape Town.

"Pay T. Jeffery, or Order, One Hundred Pounds sterling.

"B. G. Heydenrych."

This cheque Scott handed to the respondent, who endorsed it, and paid it into his bank on the same date. On the same day Scott applied to appellant for the papers relating to the property, which he required for the purpose of arranging the loan of £1,500, and these were given up to him upon his giving a personal written guarantee that the promissory note for £105 would be paid out of the sum he was raising as loan for the respondent. On the 14th November this loan had not yet been arranged, in consequence of which the respondent went to Scott, and told him he would not be able to pay the note next day, and asked whether he could not have a short extension of time. Scott said he would see "his client," but that something should be paid on account, whereupon respondent gave him £4, and signed a request for extension on the following terms: "I wish Mr. Heydenrych to hold over the loan for fourteen days upon my property *re* my promissory note to him.—Yours, T. Jeffery, November 14, 1902." On the due date, appellant presented the note for payment at Scott's office, and was handed the above request by Scott, who told him that the loan was not yet through, and might take a couple of weeks longer to arrange. Appellant thereupon agreed to the extension. During the next fortnight Scott succeeded in borrowing the £1,500 for respondent from a Mr. Hofmeyr, and on the 29th November the respondent gave Scott a cheque for £101,

the balance due on the note. The cheque was as follows, the body thereof being drawn by Scott: "November 9, 1902.—The Standard Bank of South Africa, Limited, Woodstock. Re Heydenrych. Pay James Scott one hundred and one pounds sterling.—T. Jeffery." This cheque was endorsed by Scott, and the moneys arising therefrom were converted by him to his own use, as the £4 previously given to him on account had likewise been treated. When respondent gave Scott this cheque he asked him for the note, and Scott told him that he had not got it, but promised that he would get it the next day. The respondent called twice after that for the note, but Scott put him off, and finally promised that he would send it by post, which he never did. Meanwhile, appellant, who never parted with the note, had applied after the 29th November to Scott, or at Scott's office, but Scott told him that the loan had not yet been arranged, and put him off from time to time. He seems, moreover, to have asked for respondent's address, but was put off on that point also by Scott saying that he was his agent, and was raising the loan for him. There is no doubt that all this while both parties thought Scott to be an honest man, and he seems to have been plausible enough to put them both off from time to time. Scott absconded in May, 1903, and his estate was sequestrated as insolvent. In August, 1903, appellant wrote to the respondent demanding payment of the note with interest from its due date. The letter stated: "This note was payable at the office of Mr. Scott, Cape Town, and upon application there I was always put off with the reply that Mr. Scott was raising a bond for you, and the money would then be paid. Mr. Scott had since gone insolvent, and after some difficulty I have at last ascertained your present address." The respondent refused to pay, and the appellant instituted legal proceedings on the note, and claimed provisional sentence, which was, however, refused; whereupon, he proceeded to the principal case, and the judgment now appealed from was given against him. The learned Judge found that the appellant knew nothing of his debtor, the respondent, whom he had never seen, and with whom he had never had personal communication, but that he dealt with him entirely

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through Scott, and that he accepted the note payable at the office of Scott, and not at his own place of business. This is entirely in accordance with the evidence, and thereupon his lordship's ruling is that the appellant thus intimated to his debtor that Scott had authority to receive payment on his behalf. With all due deference to the ruling of so experienced a Judge, I cannot hold that any such inference can be drawn. The terms of the note are clear enough, and they state not only that payment was to be made at Scott's office, but also that it was to be made to B. G. Heydenrych, or to his order. That is the true and complete tenour of the note, and it lies upon the respondent to show that he carried out his contract and fulfilled all that he had promised to do. It is true that he has proved that he paid to Scott the full amount of the note by the date to which payment had been deferred, but to be absolved against the holder of the note he must go further, and show that Scott had authority to receive the payment. The learned Judge seems to have held that Scott was the appellant's agent in the whole of the matter. I cannot find that the evidence in any way supports this proposition. On the contrary, there seems to me to be abundant and conclusive evidence that Scott was the agent throughout of the respondent. The respondent engaged him to raise on mortgage a loan of £1,500 for him, and this he did, receiving, no doubt, the usual commission from the respondent for such services. Whether he also received a further amount from the respondent for raising the temporary loan from the appellant, or whether he considered that those services were included in the larger business he had undertaken, is not quite clear; but it seems certain that he was not paid anything at all by the appellant. When respondent found that he could not on its due date meet the note, he went to Scott, asking him to get a short extension, and signed the request to appellant to that effect. This request Scott placed before the appellant when he presented the note on its due date, and the extension was granted. On this his lordship finds that, at Scott's request, the time for payment was extended, and this is looked upon as additional proof of his agency for appellant. But,

surely, it is exactly the reverse. Scott told respondent that he would have to see the creditor on the matter, and actually got him to sign a request to the creditor (to be presented, it is true, by Scott) for such extension. This was a clear intimation to respondent that the creditor was the person directing affairs, and that a direct application for leniency would have to be made to him. It must be held on such evidence that the extension of time was given by the appellant on the request, not of Scott, but of the respondent, and it seems to me quite clear that Scott, in placing this request before the creditor, was acting as he had acted throughout, as the agent of the respondent and for his benefit alone. A further proof of Scott's agency for appellant is deduced in the judgment from the fact that he obtained the title-deeds from the appellant as above set forth. The learned Judge says, " Heydenrych afterwards returned the power and the title-deeds to Scott, treating him as his representative in this matter." But surely all that Heydenrych did was to hand over to the agent for his debtor the necessary papers to enable him to fulfil his duty to his principal, the respondent; and so far from treating Scott as his own representative, he made him give his personal written guarantee that he would apply part of the funds to be raised, with the assistance of these documents, for his client to the payment of the note for which appellant was holding them as security. It is, therefore, clear that there is in the general conduct of the parties no evidence of agency for the appellant on the part of Scott, and the only question to be determined is whether he was, by the terms of the note itself, appointed agent to receive payment on behalf of appellant. Now, the only way in which Scott's name appears in the note is that his office is designated as the place of payment, and the place of payment, as *Story* says, of a promissory note is always a matter of arrangement between the parties for their mutual accommodation, and may be stipulated in any manner that may best suit their convenience. It is worthy of notice in the present case that the note was tendered to the appellant with the place of payment already inserted, and that place was the office of the respondent's agent, who was

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arranging the loan. This was the place selected by the respondent, and the appellant simply accepted it as being not inconvenient to himself. He fulfilled his duty according to the law regulating dealings in promissory notes, when he presented it on the due date at the appointed place, on which date he was met by the request for the extension of time, to which he acceded. When he so acceded, all he agreed to was a *pactum de non petendo* for a fortnight, and after the expiration of that period the note became payable on demand, and there was no necessity for a fresh presentation. Now, it was argued, and so held in the judgment now under appeal, that as the respondent had placed the amount of the note in the hands of Scott at the extended due date, he had discharged all his obligations according to the tenour of the note. Apart from notes made payable at a bank, to which I shall refer presently, the only authority for so sweeping a proposition that was cited was an American case, before the Supreme Court of South Carolina in 1880. That case, however, seems to me distinguishable from the present. There the maker of the note had certain factors in Charleston called Wroton and Dowling, from whom he used to get statements of account periodically, and in 1876 he had given that firm a promissory note due on the 1st October of that year, payable at their place of business, and of which it is clear that they themselves were the payees, for they subsequently negotiated the note, and passed it on for value to a holder in due course. On the due date the maker deposited at the office of Wroton and Dowling the amount of the note to meet it, and received credit for such amount from them in their books as against the note at its due date; but he did not demand back his note. The holder (a bank) did not present the note for payment on due date, and Wroton and Dowling subsequently failed, the note being still with the holders. In action brought by them against the maker, the Court held that he was discharged in the circumstances. (*Bank of Charleston* vs. *Zorn*, 37 Am. R., p. 733.) The judgment, as reported, contains some sweeping general *dicta*, which, as they stand, I think do not properly state our law on the subject; though, in reference to the particular case with which

they were dealing, they may be unobjectionable. In that case it will be observed that the payment was to be made at the office of the payees, who accepted the payment and gave credit for it. The maker had therefore discharged all his obligations under the note, and his only mistake was not to demand its restitution, which, as the payees were his trusted agents, was not one involving a large amount of negligence. The holders, however, had by the terms of the note full knowledge and notice that the debtor might, and probably would, pay to Wroton and Dowling; and in spite thereof, they did not attempt to get the money from the firm at the due date. It may well be that the Court was led to its conclusion by the consideration that the holders had adopted Wroton and Dowling as their agents to receive payment, and looked to them alone for a settlement. Even with that possible explanation, however, the case is not, to my mind, a very satisfactory one. Another case is that of *Osborn* vs. *Baird* (30 Am. R., 710), and that case is entirely satisfactory, as the note in question was payable at a bank which the Court held to be the holder's agent, and clearly designated by him as such to receive payment at or before due date. In the case of *Lazier* vs. *Horan* (reported in 37 Am. R., 736), a case from the Supreme Court of Iowa, the maker of a note was discharged, and the Court employed the following language in their judgment: "The note was made payable at a bank. Those institutions are depositories of money. They are also collection agencies through which by much the larger part of that branch of the business of the country is transacted. When a note is made payable at a bank, the parties expect the collection to be made through the bank. It is true when the defendant deposited the money the bank, while holding it, was technically the agent of the depositor. But the money was deposited for the holder of the note, and it required no act of the depositor to authorise the bank to pay the note. 'If the customer of a banker accept a bill and make it payable at his bankers, that is of itself sufficient authority to the bankers to apply the customer's funds in payment of the bill.' (*Byles on Bills*, 151.) And if the money be deposited for the

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payment of such a bill or note, the holder may maintain his action against the bank therefor. By the very terms of the contract the defendant agreed to pay the note at the bank. Now, while it is a general rule that payment of a note or bill should be made to the actual holder, yet when the parties have contracted that payment may be made at a bank, it means that payment is to be made to the bank." For myself I should say that the concluding dictum of the above judgment is going somewhat too far, if it can be taken to be meant to have universal application, and not to be dealing with the commercial law of the State of Iowa alone. That the doctrine as stated in *Lazier* vs. *Horan* is not universally adopted by the American Courts is clearly shown by the case of *Indig* vs. *National City Bank* in the New York Court (reported in 37 Am. R., p. 736), in which the Court said: "It is by no means clear that the maker of the note is discharged. When a note is payable at a bank an entire failure to present it for payment does not discharge the maker. If the maker has not sufficient funds in the bank, the omission to present is of no consequence. If he has funds, then he can plead it by way of tender, and is relieved of liability only for interest and costs. And even if the bank fails with funds in its hands, this is no defence to the note. The bank is in such cases regarded simply as the agent or depository of the maker of the note, and he alone suffers by its failure, and his promise to pay is not discharged. In this respect only a note, or bill, payable at a bank, differs from a cheque. Therefore, if there has been no presentment whatever, and the bank had failed with sufficient funds of the maker in its hands to pay the note, the maker is still liable." Personally, I am of opinion that in all cases, even when a bank is the place where a note or bill is payable, it is a matter of evidence whether the bank is the agent of either or both of the parties, though the presumption would be in favour of holding that in such cases the intention of the parties was to establish a mutual agency. This would be in accordance with ordinary commercial usage and custom; but it would still be open to either party to show that the agency of the bank was purely for the

convenience of the other. To go further, however, and to hold that when a bill or note is made payable at the house of a private individual, or at the office of an ordinary business man, an agency is thereby established by which such private individual or business man is made the agent for the holder to receive payment, would lead to unsettling well-known rules of commercial law relating to such matters, and to impairing the well-established rights of holders of negotiable instruments of that nature. I may add that all the cases that can be quoted in which the makers of notes have been discharged from liability proceed, as far as I am aware, on the ground that no presentation was made in good time, though funds had been provided by the due date. In the present case there was a presentation on the due date, and the holder, at the maker's request, gave him time. Thereafter the respondent paid the amount directly by cheque in favour of his own agent, and did not even take the precaution to make out his cheque in favour of his creditor. His agent was a dishonest man, as it appears from the evidence, and by his plausibility was able to deceive both parties for a long period, and put them off—the one in his demand for the return of the note which he had signed, and the other in his demand for his money. They both were too confiding in Scott, and consequently neither displayed the proper amount of diligence which might have been otherwise expected of them; but the person who really enabled Scott to carry out his fraud and appropriate the £105 to his own use seems to me to have been undoubtedly the respondent, and I am by no means convinced on the evidence that even if the appellant had presented the note again on the 29th November, and again and again shortly thereafter, he would have received payment thereof from Scott, who would probably have made some plausible excuse to evade parting with the money which he had improperly obtained; and that Scott would have paid over the money if demand had been made is a matter of defence which it lay on the respondent to establish. Therefore, even on the equity of the case, I think the respondent should be the one to suffer the loss, which was occasioned primarily by his own rash and blind trust in his own agent.

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For these reasons, I am respectfully of opinion that the appeal should be allowed.

DE VILLIERS, C.J. : This is an appeal from a judgment of the Divisional Court in an action brought by the holder against the maker of a promissory note for £105. The action originated with a summons for provisional sentence, and at the hearing the defendant's affidavit was produced, which satisfied the Court that there were good grounds for holding that he had paid the amount of the note to one Scott, at whose office the note was payable, and that he had been led to believe that Scott had authority from the plaintiff to receive such payment on his behalf. Provisional sentence was accordingly refused, with costs, and the plaintiff proceeded with the principal case before a Divisional Court. At the trial a letter written by the defendant to the plaintiff on the day before the note fell due was produced, which showed that the defendant then knew that the plaintiff was the holder of the note, and that the defendant could not then have believed that Scott had full powers to act on behalf of the plaintiff. The only evidence of such agency left was the fact that the note had been made payable at the office of Scott. Upon this point the learned Judge, in his reasons, says : "The plaintiff knew nothing of the debtor, whom he had never seen, and with whom he had had no communication, but dealt with him through Scott. Instead of making the note payable to himself at his own office, he accepted the note made payable at the office of Scott. He thus intimated to the debtor that Scott had authority to receive payment on the plaintiff's behalf." The learned Judge accordingly gave judgment for the defendant, with costs.

There can be no doubt that the fact of the note having been made payable at Scott's office would have been a link in the chain of evidence to establish Scott's agency, but standing by itself, it is not, in my opinion, sufficient to establish such agency. The note was made payable at Scott's office for the convenience of the defendant, who had employed Scott to raise a permanent loan of £1,500 for him on the security of some property. While Scott was negotiating with intending lenders, the

defendant was in urgent need of £100, and Scott undertook to obtain the amount as a temporary loan. He accordingly applied to the plaintiff, who gave his own cheque for the amount in favour of the defendant or order, and received the promissory note in question, payable one month after date. On the due date he presented the note for payment at Scott's office, and was met with the defendant's letter, to which I have already referred. The letter, which bore the previous day's date, read as follows: "I wish Mr. Heydenrych to hold over the loan for fourteen days upon my property *re* my promissory note to him." It is quite incomprehensible to me why this letter, which has such an important bearing on the case, was not produced at the provisional hearing. In his affidavit, the defendant said: "On the 15th November, 1902, the due date of the note, not being in a position to meet the same, I saw Mr. Scott at his office, and applied to him for an extension of time for payment for a further fortnight. He replied that he would see his client, and let me know afterwards. I again called in the afternoon of the same day, and Mr. Scott then told me that it would be all right; I could have the extension for a fortnight if I paid him a few pounds on account, as he was short of money. Having some £4 in cash with me, I handed same over to Scott." Not a word in this statement about the defendant's own letter of the previous day requesting the plaintiff by name to give a fortnight's extension. Knowing that the plaintiff, as the holder of the note, had been asked by himself for an extension of time, the defendant, on the due date of the note, made a payment on account to Scott for his personal use, and within the fortnight following he paid the balance to Scott by his cheque made in favour of Scott. This money was paid out of the amount raised by Scott on permanent loan. The promissory note, however, was not delivered to the defendant, for the plaintiff had never parted with the possession of it. Clearly, therefore, without proof of Scott's authority to receive payment of the note on behalf of the holder, the defendant, as maker, remains liable. The note could only be discharged by payment to the holder, and, as Scott had not the note in his possession, the burthen of proving his authority

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to receive payment lay on the defendant. The evidence given at the trial satisfies me that some of the statements in the defendant's affidavit were wholly misleading, and that Scott had no authority from the plaintiff to receive payment of the note.

At the hearing of the appeal a passage in *Story on Bills of Exchange* (p. 356) was relied upon as supporting the defendant's discharge from liability. The passage reads as follows: "In respect to the acceptor, no presentment or demand of payment of a bill payable at a banker's or other particular place need be made at that place on the day when the bill becomes due or afterwards in order to maintain an action against him; but it is a matter of defence on the part of the acceptor that he had funds at that place to pay the bill, which, if true, will exonerate him from the payment of all damages and interest; and if he has been injured, or has sustained any loss, by the neglect of the holder to demand payment at that place (as if the bill be payable at a bank, and the acceptor had funds there, and that bank has since failed), then the acceptor will be discharged from liability on the bill to that extent." The first part of *Story's* statement of the law would not apply to the maker of a promissory note, for although, in general, his rights and liabilities correspond to those of an acceptor of a bill of exchange, the first sub-section of sec. 80 of Act 19 of 1893 specially provides that "where a note is in the body of it made payable at a particular place, it must be presented at that place in order to render the maker liable, unless the particular place mentioned is the place of business of the payee, and the note remains in his hands." In the present case, the place of payment, which is mentioned in the body of the note, is not the plaintiff's place of business, but he did duly present the note for payment on the due date. As to the latter part of *Story's* statement, it is not necessary to inquire whether our law agrees with the American law, for the simple reason that the facts stated by him as matter of defence do not exist in the present case. On the due date of the note, the defendant had no funds at Scott's office to pay the note. During the fortnight's interval after the due date, the defendant made no deposit with Scott for payment to the plaintiff,

but he made a direct payment to Scott, knowing that Scott had not the note in his possession. If he chose to take the risk of paying Scott, he might have protected the plaintiff and himself by giving Scott a crossed cheque in favour of the plaintiff, instead of giving a cheque made in favour of Scott. If there was negligence on the part of the plaintiff, there was still greater negligence on the part of the defendant, when once it is established that Scott was not the plaintiff's agent to receive the payment of the note. As to the nature of the neglect on the plaintiff's part, which would, according to the American authorities, release the defendant, the case of *Charleston National Banking Association* vs. *Zorn* (37 Am. R., 733) shows that the defendant would have to prove that the plaintiff was guilty of neglect in not demanding payment of the note at the office of Scott before he absconded, that the plaintiff would have received the money if the note had been presented, and that, owing to such non-presentment, the defendant lost the money. In point of fact, the plaintiff did present the note at Scott's office at the due date, and again after the expiration of the fortnight's delay. On the first occasion he was met with the defendant's letter asking for a fortnight's delay, and on the subsequent occasions he was put off with the false excuse that the permanent loan of £1,500 had not yet been raised for the defendant. The case of *Lazier* vs. *Horan* (37 Am. R., 735) has also been relied upon, but there it was clear that if the holder of the note had presented it at the bank on the due date, the note would have been met. The deposit at the bank was regarded by the Court as a setting apart of the money for and on behalf of the holder of the note, and the failure of the holder to call for the money on the due date was regarded as an act of neglect, which discharged the maker on the subsequent failure of the bank. In the present case, no money was paid to Scott on or before the due date of the note; when the money was so paid, it was handed over, not as a deposit for the plaintiff, but as a direct payment to Scott, and the plaintiff did, after the expiration of the fortnight, apply without success to Scott for payment. It is not clear that the application was made on the very day on

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which the fortnight expired, but it is manifest that if the plaintiff had presented the note on that day, it would not have been paid. It is quite impossible, therefore, to hold that the non-presentment of the note was the cause of the defendants losing the money. Even, therefore, if the American decisions were binding, there would be no ground for holding that the defendant is discharged from liability on the note.

It was suggested by the learned Judge in his reasons, although it was not made a ground of his decision, that the receipt by the plaintiff of a guarantee from Scott, and the plaintiff's delay in demanding payment from the defendant, are circumstances which in equity should be held to relieve the defendant from liability. The guarantee, which was given on the day when the note was made, was as follows: "B. G. Heydenrych, Esq.—Dear Sir,—On account of you advancing Mr. T. Jeffery £100 upon his promissory note, I guarantee that the said promissory note £105 will be paid to you out of loan of £1,500 I am arranging for said Mr. Jeffery.—Yours, James Scott." I confess I fail to see how this guarantee assists the defendant either in establishing Scott's agency for the plaintiff or in affording an equitable defence to the action. The letter shows that Scott was acting as agent for the defendant, and that, in order to secure the temporary loan of £100 from the plaintiff, Scott gave his own guarantee that the money would be paid out of the proceeds of the permanent loan. This guarantee was an additional security for the plaintiff, and could not have been intended in any way to limit the liability of the defendant as the maker of the note. In regard to the plaintiff's delay in demanding payment from the defendant, his explanation that he could not discover the defendant's address is by no means satisfactory, but, unless the Court is prepared to hold that there was collusion between the plaintiff and Scott, the delay cannot deprive the plaintiff of his right as holder to recover payment from the maker of the note. The plaintiff could only lose his remedy on the note if he failed in doing anything that was obligatory on him to do. If, for instance, he had failed to present the note at Scott's office on the due date, the defendant would not

have been further liable on the note, whatever other remedy the plaintiff might have had. But there was no obligation on the plaintiff to proceed against the defendant on the note or against Scott on the guarantee, and consequently his delay does not afford any legal or equitable ground for relieving the defendant from liability. I am bound to say that, considering the high rate of interest which the plaintiff demanded for the month's loan, his delay in suing on a note on which he could only recover 6 per cent. from the due date, does give rise to suspicion; but it would be highly dangerous on mere suspicion to break upon the rules which regulate the relative rights and duties of parties to negotiable instruments. It is with great regret, therefore, that I am unable to concur with the judgment of the Divisional Court. In my opinion, the appeal should be allowed, with costs, in this court, and judgment entered for the plaintiff for £105, with interest at 6 per cent. from 15th November, 1902, and costs in the court below.

BUCHANAN, J., said: As this is an appeal from a judgment given by me, I should have preferred not to have taken part in the decision of the case now, but the exigencies of the Court require my presence. The judgment I gave in the Divisional Court indicated clearly and distinctly the grounds upon which I based my decision. No authorities were quoted by counsel at the trial in support of their several contentions, and now the strongest cases cited in favour of the judgment appealed against are to be found in the American reports. These cases have been fully discussed in the judgments just delivered by my brethren, and it is not necessary to go over them again in detail. Some of them certainly support the view I took at the trial, though they are not all in agreement. But it has been pointed out, especially in the judgment of His Lordship the CHIEF JUSTICE, that, even supposing these authorities disclosed our law, there were special circumstances in this particular case which took it out of the rule laid down in those decisions, one of the most important of these being the fact that when the promissory note was duly presented the money had not yet been paid by the maker of the

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note. I am not wishing to concur in the view that under no circumstances would the deposit of the money at the place of payment specified in the note on the due date relieve the payee. All that is necessary to decide in this case is, that as there had not been such a deposit, the subsequent payment to Scott, who was not then in possession of the note or authorized by the holder to collect it, was not a good payment. I do not feel at liberty to maintain the correctness of my decision against the opinions of my brethren, seeing there are so many flaws in the defence set up. I cannot, however, omit to express my opinion that the equities of this case are strongly against the plaintiff, and his conduct gives rise, in my mind, to such grave suspicion that I certainly would not be astute to find grounds for assisting him, after the tactics of which he has been guilty, in recovering from the maker of the note. But the onus of proving the defence, however, is on the defendant.

Appeal allowed accordingly, with costs, and judgment entered for the plaintiff in the Divisional Court, with costs, but not including the costs of the provisional case.

[Appellant's Attorney, VAN DER BYL.
Respondent's Attorneys TREDGOLD, MCINTYRE, & BISSETT.]

REX *vs.* WILLIAMS.

Appeal.—Evidence, improper admission of.—Prejudice.—Insolvent's Examination.

The appellant, who was an insolvent, was examined on oath at the third meeting of creditors under the 7th section of Act No. 38 *of* 1884, *and was subsequently charged before the Resident Magistrate with theft by means of embezzlement and breach of trust. At the trial the proceedings in insolvency, including the evidence given by the appellant, was admitted as evidence, notwithstanding an objection being taken thereto, and the appellant's depositions were read. The depositions had an important bearing on the case, for without them there was no reasonable certainty of con-*

viction on the other evidence led. Held,—*that as substantial prejudice was caused by the admission of the evidence, the conviction should be set aside.*

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This was an appeal from the High Court of Rhodesia, which had confirmed the conviction of appellant Williams by the Resident Magistrate of Salisbury on a charge of theft by means of embezzlement. Appellant and one Money had been trading together in partnership as auctioneers and commission agents at Salisbury. The firm's estate had been sequestrated, and the partners were tried on six charges of appropriating money to their own use which they had received for clients, and had not paid over before insolvency. The appellant had been examined on oath before the Master as to his dealings, and his deposition contained admissions that were greatly against him. This deposition, as well as the other papers connected with the insolvency, had been put in at the preliminary examination, when accused was committed for trial. The case was remitted to the Magistrate, and after accused had been charged and pleaded, the prosecutor tendered in evidence all the papers dealing with the proceedings before the Master. The agent for the defence objected to the admission of the deposition of accused, but the objection was overruled. The charges of embezzlement were enquired into, and a verdict of guilty on all counts was returned, and the accused were sentenced. They appealed to the High Court, when the conviction of Money was quashed, but that of appellant was confirmed.

The Magistrate, in his judgment, dealt very briefly with the objections taken to the admission of the deposition and other papers, giving his attention mainly to the evidence led on the various charges of embezzlement. On appeal to the High Court it was not clear that Counsel had relied on the wrongful admission of evidence, but had argued on the merits that only a civil liability had been created, and that the question was simply a matter of account between the parties. The learned Judge, in his reasons, found it proved that the principals had looked to the personal credit of the accused, and that there had been a breach of trust monies by the insolvent, and

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therefore the prosecution had succeeded in establishing the charge of theft.

McGregor, for the accused, on appeal, now relied strongly on the objection to the admissibility of the evidence given before the Master in the proceedings in insolvency. He also argued on the merits that the charge of theft had not been established. He cited *Queen* vs. *Walker*, 8 Cox C. C., 1; 27 L. J., Mag. Cas., 207; *Stephens on Ev.*, arts. 205, 309; *Russell on Crimes*, 6th ed., vol. ii., p. 134; *Q.* vs. *Hassall*, 30 L. J., M. C., 175; *Matthœus de Crim.*, tit. 1, de furtis, cap. 1, par. 2; *Rex* vs. *Golding*, 13 S. C. Rep., 210; *Hart on Auctioneers*, p. 263; *Martyn* vs. *Rocke, Eyton & Co.*, 34 W. R., 253.

Pyermont supported the conviction. On the question of admissibility of the evidence he referred to *Rex* vs. *Viljoen*, 7 Sheil, 465. Even if the evidence was not strictly admissible no substantial wrong had been done (Act No. 22, 1898, sec. 14). Mere admission of evidence was not in itself sufficient ground upon which to quash the conviction. He also argued the merits.

McGregor, in reply, contended that the Magistrate's mind was necessarily affected by the improper evidence. This improper evidence was necessary and material to uphold the conviction. (Act 72, 1850, sec. 28; Act 6, 1843, sec. 61; Act 38, 1884, sec. 7.)

De Villiers, C.J.: At the trial of the accused an objection was taken by his legal adviser to certain evidence which had been admitted at the preliminary examination being again used for the trial. The evidence consisted of all the proceedings in insolvency, and included in those proceedings was the evidence given by the accused himself before the Master under the Insolvent Ordinance. The Magistrate, however, dismissed the objection, and he proceeded to try the case upon the merits. There subsequently was an appeal against the judgment of the Magistrate to the High Court of Southern Rhodesia. It is not clear whether that objection was taken before the Judge. He says nothing about it in his reasons, but I consider that, notwithstanding that the objection was not taken before him, it is still competent to the appellant,

whose agent did take the objection in the Court below, to take the objection again in this Court. Now, it appears to me that the evidence was wholly inadmissible. By the 7th section of the Act 38 of 1884 it is enacted: "It shall be lawful for any creditor, or the attorney or agent of any creditor, as well as for the Master of the Supreme Court, or Resident Magistrate, as the case may be, to examine any insolvent upon oath under the provisions of 61st section of the said Ordinance. And if at any such examination it shall appear to the said Master or Magistrate that there are reasonable grounds for suspecting that the said insolvent has been guilty of culpable or fraudulent insolvency, it shall be the duty of such Master or Magistrate to call for such further evidence and documents as he may deem necessary, and submit such evidence to the Attorney General, or Solicitor General, or Crown Prosecutor, as the case may be, for the purpose of instituting criminal proceedings against such insolvent, and at any such examination no insolvent shall be entitled to refuse to answer any question on the ground that the answer, if given, might tend to incriminate him." Now, the appellant, who was the insolvent, was bound to answer any question put to him, and I consider that any evidence which was given by him in such circumstances ought not again to be used at any trial against him. Any evidence that is given at such trial should be quite independent of any evidence which the insolvent had given under compulsion. It does not, however, follow that the Court of Appeal would in every case necessarily quash the conviction if such evidence had been given. If it were unimportant evidence, and had really no bearing upon the trial, the Court of Appeal would not set aside the conviction by reason merely of the inadmissibility of the evidence. In the present case, however, it is clear that the evidence was extremely important, and that by its admission a substantial wrong was done to the appellant. The case which has been cited of *Rex* vs. *Viljoen* really does not affect the present case. In that case the sole question to be decided by the appeal was whether the insolvent had kept proper books. The books were produced before the jury, and quite independently of any testimony given by the

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insolvent at the third meeting, the jury came to the conclusion, through an inspection of the books, that he had not kept proper books. The books were also brought before the Court of Appeal. The Court had an opportunity of inspecting the books, and found that they were not proper books. Therefore, it was not a question of evidence which would influence the mind of the Magistrate. In the present case, however, it is impossible to say to what extent the evidence given by the insolvent before the Master affected the mind of the Magistrate. All the evidence was read, including the evidence given by the insolvent. The case is just on the borderland of criminality and non-criminality. It was one of those difficult questions which require great care and discrimination in deciding, and it is quite possible that the Magistrate's mind would be influenced by the impression left on his mind by the insolvent's evidence. He even admits, as to one of the counts, that he had such doubts that he would have given the benefit of the doubt in favour of the accused but for the statement which the accused had made at the third meeting. Unconsciously the Magistrate may have been equally influenced in his decision upon the other counts. For these reasons, I am of opinion that in the present case it is impossible to hold that under the Act of 1898 the evidence was so unimportant as to justify the Court in upholding the conviction. In my opinion, the conviction should be quashed. I may only add that this matter was not brought before the Judge who heard the case on appeal, and I believe that if it had been brought prominently before him, his decision would have been the same as the decision of the Court of Appeal.

BUCHANAN, J.: I concur in the decision just pronounced, and only wish to say a word or two on the question of the improper admission of evidence. The 28th section of the Law of Evidence Ordinance No. 70 provides first that no confession made on oath, and, secondly, that no deposition made on any judicial examination under the old Insolvent Ordinance, shall be admissible in any criminal prosecution of the person making the same other than for perjury committed by

him on such examination. The principle underlying this provision I take to be that a confession must be freely and voluntarily made. When a person is giving evidence in a judicial enquiry upon oath, he cannot be said to be making voluntary statements, especially in insolvency enquiries, where the insolvent cannot refuse to answer a question because it may tend to criminate himself. This principle is recognised in the 11th section of the Ordinance No. 30, where evidence given by an accomplice may not be used against such accomplice should he afterwards be tried for the offence. I remember that in a case tried before me on circuit, I think at Malmesbury, I refused to allow the evidence given by a witness at a coroner's inquest to be used against such witness when he was afterwards being tried for the murder of the person whose death had been the subject of the coroner's enquiry, and I have on several occasions, when presiding at the Criminal Sessions, refused to allow an insolvent's examination before the Master to be used against such insolvent at his subsequent trial for matters connected with his insolvency. The principle, of course, does not apply where a person at his trial voluntarily becomes a witness on his own behalf. In such a case he is not a compellable witness, and he stands in the same position as any other witness at the trial. In the case under appeal the evidence was clearly not admissible. But it is said there is sufficient evidence *aliunde* to support the conviction. That is not necessarily the test to apply. The proviso to section 14, of Act No. 22, 1898, says the improper admission of evidence must work no substantial wrong to the person charged. Here the Magistrate expressly founds his finding on the evidence which should not have gone before him, and in my opinion there was, in consequence, a substantial wrong done to the accused.

MAASDORP, J., concurred.

Appeal accordingly allowed, and the Court directed that the judgment be set aside, notwithstanding the verdict.

[Appellant's Attorney, TROLLIP.
Respondent's Attorneys, SYFRET, GODLONTON & LOW.]

INCORPORATED LAW SOCIETY *vs.* MCLEOD.

Articled Clerk.—Service.—Rule of Court No. 149.

The 149*th Rule of Court, regulating the service required from Articled Clerks, must be observed to entitle a clerk to claim admission as of right; but the Rule does not prevent the Court exercising its discretion in accepting as sufficient other approved service.*

Where a clerk had been articled to and had duly served an attorney of this Court now carrying on business in Rhodesia, where the profession of an attorney is practised in the same way, and is guided by the same laws and rules of etiquette as are observed in this Colony, the Court allowed such service to count, upon the clerk duly entering into and registering articles to serve for one year with an attorney of the Court practising in this Colony.

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Incorporated Law Society *vs.* McLeod.

This was an appeal from the decision of HOPLEY, J., sitting in a Divisional Court in Cape Town.

The applicant, A. B. G. McLeod, filed a petition setting forth that on the 20th November, 1901, and at Salisbury, he was articled to A. H. McLeod, an attorney of this Court and of the High Court of Rhodesia, to serve as a clerk in the profession of attorney-at-law and notary public for a term of three years reckoned from said date; that he had under such articles served uninterruptedly from the 20th November, 1901, to the 30th June, 1904; that being desirous of presenting himself for examination for the Law Certificate in December next, he had on the 1st July come to Cape Town to study; that he was desirous of completing his term of service in Cape Town under an attorney of this Court, and that H. A. McLeod was willing to cede the articles to such an attorney. Wherefore he prayed so be permitted to complete his term of service to an attorney of this Court, and that his service already performed might be considered as good service, and that leave be granted to have his articles ceded, in order that he might duly complete three years

of service as required by law, or that he might have other relief.

The Law Society appeared to point out the non-compliance with the Rules of this Court. After hearing Counsel, HOPLEY, J., ordered that petitioner be allowed to enter into articles of apprenticeship with an attorney of this Court to serve him until the 30th June, 1905, such articles to be duly stamped and registered as required by the law of this Colony, and that the time of service with Mr. McLeod, in Rhodesia, be allowed to count as service in this Colony.

Against this order the Law Society now appealed. His Lordship's reasons, which fully set forth the facts, were as follows :

The petitioner was, on November 20th, 1901, duly articled at Salisbury, Southern Rhodesia, to Mr. Alfred Henry McLeod, an attorney of this Court and also of the High Court of Southern Rhodesia, to serve him as a clerk in the profession of Attorney-at-Law and Notary Public for a term of three years. The articles were duly registered and filed in the office of the Registrar of the High Court of Southern Rhodesia, and the petitioner served under the said articles continuously until the 30th June, 1904, when, being desirous of presenting himself for examination as a candidate for the Law Certificate of the University of the Cape of Good Hope at the examination to be held in Cape Town in December, 1904, and being further desirous of obtaining in Cape Town tuition to fit him for the said examination, he, with the consent of Mr. Alfred McLeod, removed to Cape Town, where it is stated he has since been continuously serving as a clerk in the office of an attorney of this Court. He now applies that he should be allowed to have his articles ceded by Mr. McLeod, who is willing to do so, to an attorney of this Court in Cape Town, and that his service with Mr. McLeod, in Rhodesia, should be allowed to count as service in this Colony. The Incorporated Law Society appear to point out that according to the 149th Rule of Court it is necessary that the articles should be to serve within this Colony and that the applicant should, during the whole of three years, have continued to be actually employed in such service within this Colony. There is no doubt that the strict reading of the rule in question is against the applicant, but it should be borne in mind that the circumstances of this country have changed in very many and important particulars since the year 1829 when the rule was promulgated. We are here concerned with a case involving our relations in such matters with Rhodesia, a great British dependency, which was not contemplated in 1829, and which is now governed by the same system of law as obtains in this Colony, the Supreme Court of which exercises appellate jurisdiction over the Courts of that country. Moreover, the practice of the Courts and all the duties of attorneys and notaries are, as far as I am aware, identical in Rhodesia and in this

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Colony, so that for all practical purposes it is immaterial whether a clerk receives his instruction in the knowledge and practice of the law in that country or in this Colony. The 149th Rule of Court, while it lays down that persons who have been articled and who have been served as therein laid down, shall be eligible to be admitted and enrolled as attorneys of this Court, does not go further and state that no other mode of service will be approved of by the Court, and that no other persons save those dealt with in that and the immediately succeeding rules shall be eligible. The Court can exercise, and has more than once exercised its discretion, and upon good cause shown has granted relief in cases where the service under articles has not been in compliance with the strictest interpretation of the original rule. The cases cited during the argument sufficiently show this, and indicate that, while the Court is careful that no person who has not had a proper training and proper legal instruction should be admitted, it exercises an equitable jurisdiction, and does not exclude persons who have in effect complied with all the reasonable requirements of the rule. In the present case the applicant has served an attorney of this Court. That attorney, it is true, is not carrying on his business in this Colony, but he is practising his profession in exactly the same way, and is guided by the same laws and rules and etiquette as he would have observed in this Colony. I am, of course, aware that there are some local laws in Rhodesia which deal with the circumstances of that country. They do not, however, affect the matter which I am considering, but with regard to the whole system of law in vogue in that country this Court has an appellate jurisdiction, and as to any attorney of this Court, though he may be practising there, this Court would have power to strike him off its own rolls for any misconduct sufficiently grave to warrant such punishment, wherever such act of misconduct may have been committed. The petitioner has come from an office of an attorney of this Court, where he has received such instruction as above indicated, directly to an office of another attorney of this Court in Cape Town, where he seeks to be allowed to serve without suffering any loss of time by reason of his service in Rhodesia. His petition should in a large measure be acceded to, and it would be difficult to refuse it after such cases as *In re Crawford* (15 S.C. Rep., 105) and *In re Rothman* (13 Sheil's Rep., 276). He served Mr. McLeod until the 30th June, 1904, and the service in this Colony should extend until the 30th June, 1905. The Law Society also brought to the notice of the Court the fact that by Act 27 of 1883, section 14, the articles should be registered within three months with the Council of the Society. It is, however, obvious that in cases such as the present, it would be impossible, with any sense of fairness, to insist on such registration as a *sine quâ non*. Due and proper registration of petitioner's articles was made with the Registrar of the High Court of Southern Rhodesia, which is all that was required of him in that country, and it seems to me that if he is allowed to transfer his articles or enter into new ones here under the special circumstances of his case, he should be allowed to register his articles forthwith upon payment of the necessary fee. It was also pointed out that there was no precedent for cession of articles as it is here prayed may be allowed, and

my attention was drawn to the fact that upon the original articles there is a stamp duty of £10, of which in this case the Government would on a mere cession be deprived. I think difficulties might arise from allowing a cession, and on the whole am of opinion that there should be fresh articles. The order of the Court therefore is, that petitioner be allowed forthwith to enter into articles of apprenticeship with an attorney of this Court, to serve him until the 30th June, 1905, that such articles be duly stamped and registered as required by the laws of this Colony, and that his time of service with Mr. McLeod, in Rhodesia, be allowed to count as service in this Colony. I may add that I think that the Law Society was perfectly right in appearing to point out the difficulties of the case, and I personally am of opinion that it would be wise to alter the Rules of Court dealing with such matters, so as to meet the requirements of the present time and of the altered conditions of this Colony and of the other States of South Africa.

Sir H. Juta, K.C., for the Law Society, reviewed the different provisions affecting the admission of practitioners since the establishment of the Court, citing the Charter of Justice, sec. 20; Rules of Court Nos. 149 and 151; Act No. 12, 1858, sec. 3; Act No. 27, 1883, sec. 14; Act No. 30, 1892, sec. 6; *Ex parte Haw*, 1 Searle, 22; *In re Lance*, Buch. S. C. Rep., 1879, 78; and commenting on *In re Crawford*, 15 S. C. Rep., 105; and *In re Rothman*, 13 Sheil, 276.

Percy Jones, for the applicant, referred in addition to the cases cited to *In re Holderness*, 17 Sheil, 255.

De Villiers, C.J.: On behalf of the Law Society reliance is mainly placed on the 20th section of the Charter of Justice, which enacts that the Supreme Court shall have the power to approve, admit, and enrol as attorneys and solicitors, such and so many persons as may be instructed within this Colony in the knowledge and practice of the law; and it is contended that the Court has no power to admit any person who has not, for the full period—whatever that may be—been instructed in the knowledge of the law within the Colony. The Charter of Justice, however, does not say that he shall be so instructed in the Colony during the whole of the period of his articles. If that had been the true meaning of the 20th section of the Charter of Justice, then it is quite clear that the 151st Rule of Court would be *ultra vires*, because by that Rule of Court a person who has

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been articled in this Colony for only a year may be admitted if, for the rest of the period, he has served in England or Scotland. As far back then as 1829 the Court has exercised the power of admitting persons who had not been instructed for the full period in this Colony. I quite agree with *Sir Henry Juta* that there has been some degree of laxity of late years. This laxity has probably originated from the fact that there is much closer connection and inter-communication with the other British colonies in South Africa than before. The connection with Rhodesia, for instance, is now so close that this Court, sitting here now, is really a Court of Appeal from the High Court of Rhodesia, and, as a matter of fact, the great majority of attorneys practising in that colony, as well as in the neighbouring colonies of the Orange River Colony and the Transvaal, have originally been admitted as attorneys of this Court. There is good reason, therefore, for exercising every comity towards the other colonies in the admission of persons who have there been instructed for a part of the required time. I quite agree that such comity should be exercised within the limits laid down by the law, but I am not prepared to admit that the Court has ever exceeded such limits. The object of the Court has always been to ensure the efficiency of persons admitted to practise in this Colony, and every order has been made with a view to securing such efficiency, and although in some cases there has been a liberal interpretation of the Rules of Court, I am not prepared to say that there has been any departure from the law. To take the case *In re Rothman*, that certainly seems to be one of the strongest cases. That was only decided last year. Application was made by *Sir Henry Juta* on behalf of Rothman, and no objection was made by the Law Society. The Court naturally assumes that if there is any serious objection on the part of the Law Society, who know that the application is about to be made, such objection would be stated to the Court. Well, my candid opinion is that if the Law Society had opposed and the matter had been fully gone into, the decision might have been different. The present case came before my learned Brother HOPLEY, who gave the fullest and most careful attention to the matter, and

came to the conclusion that this was one of the cases in which indulgence ought to be granted. He made an order, therefore, that fresh articles were to be entered into; that there was to be another year's service in this colony; and that, after such service, petitioner should be admitted. Well, I am not now prepared to reverse that decision; to say that it was wrong. It is quite possible that if the case had been argued before this Court in the first instance—fully argued—it may have been that a different decision would have been arrived at, but the fact is that the learned Judge performed the functions of the Supreme Court, and decided that under the circumstances the indulgence asked for should be granted.

BUCHANAN, J.: There is a distinction between a case where an applicant claims admission as of right, and a case where the applicant seeks an indulgence. Where a claim is made as of right all the different Acts and Rules of Court must be complied with. But where the Court is asked as a matter of indulgence not to enforce strict compliance with any particular rule, there is some discretion in the Court to grant or refuse the request. I concur that in this case we should not interfere with the discretion which has been exercised by the learned Judge, seeing that similar relaxations of the Rule of Court have previously been made. At the same time, I wish specially to emphasize the fact that future applicants cannot as a matter of right rely on any such relaxations being made in their favour. As long as the Rule remains it should be complied with. We have excellent authority for condemning departure from strict rule, error undoubtedly thereby creeping into the state. It is far better for applicants to comply with the Rules than to take the chance of obtaining an indulgence, and in all probability meet with disappointment.

MAASDORP, J., concurred.

Appeal accordingly dismissed. No order as to costs.

[Appellant's Attorneys, MOORE & SON.
Respondents' Attorneys, VAN ZYL & BUISSINNE.]

LE ROUX *vs.* MALHERBE.

Undivided Ownership.—Possession.—Prescription.

The open, peaceable, bonâ fide *possession as of right of a definite share of an undivided farm for the period of prescription entitles the possessor to claim registration of title to such share.*

An application was made by Tielman François Malherbe, under the Derelict Lands Act, for the enregisterment in his name in the land registry of the Colony of one-sixteenth share in the undivided farm Berg Rivier's Hoek, at present registered in the name of one Pieter Edward Hauman. A rule *nisi* in the usual terms was granted by a Judge in Chambers. On the return day of the rule the widow Le Roux (born Hugo) opposed, and claimed that the whole of a one-eighth share in the farm standing in the name of the said Hauman should be transferred to her. E. C. Le Roux, another part owner in the farm, also opposed the rule, and claimed the one-eighth in question as being the property of all the present registered owners of the remaining extent. After hearing Counsel, DE VILLIERS, C.J., sitting in a Divisional Court, dismissed the claims of the opposing owners, and made the original rule *nisi* absolute, with costs. Mrs. Le Roux now appealed against this decision.

The facts of the case were set forth in the Presiding Judge's reasons, as follows :

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The petition prayed for an order that one-sixteenth share in the farm Berg Rivier's Hoek, at present registered in the name of Pieter Edward Hauman, be registered in the name of the petitioner. The grounds of the application are two-fold, namely, ownership by virtue of transfer, and title to ownership by virtue of thirty years' occupation, but I shall deal only with the second, which was the ground on which the rule was granted.

In the year 1872, the petitioner purchased, paid for, and received transfer of one-eighth undefined share of the farm from one Douglas, and in the year 1891 he sold one-half of his share to one J. P. Le Roux. During the intervening period he occupied and made use of his eighth share, and, after the year 1891, he occupied and made use of the remaining sixteenth share. In March, 1903, he sold that sixteenth share to

one Starke, but the Registrar of Deeds refused to allow transfer on the ground that the petitioner's predecessor in title, De Villiers, who transferred one-eighth share to Douglas, himself had only one-sixteenth to transfer. De Villiers had been the owner of one-eighth only, and had previously transferred one-sixteenth to other purchasers, but the transfer was not noted against his title-deeds. In consequence of the mistake Douglas received transfer of one-sixteenth more than the transferor could legally transfer. The petitioner purchased his eighth share from Douglas, in whose name that share stood registered in the Deeds Office, and it is clear that he did so in the full belief that Douglas was the owner of that share. It is common cause that if the petitioner is entitled to have his sixteenth share duly registered, the deduction will have to be made from the one-eighth share standing registered in the name of one P. E. Hauman, sen. He died in 1831, but the eighth share in his name was not granted until 1839, and no authentic information is forthcoming as to any definite occupation of his share by anyone representing his estate.

The rule has been duly published and no objection has been taken to it by anyone representing his estate, but one of the registered owners, E. C. Le Roux, claims on behalf of himself and the other registered owners that the share of P. E. Hauman, sen.'s estate, if derelict, should go to them. He does not, however, allege that they occupied more than the shares transferred to them, and it is clear from the evidence that their occupation has been in accordance with their respective titles. It is obvous, therefore, that they are not entitled to any portion of P. E. Hauman's share.

The only other claimant is Mrs. H. M. Le Roux, who claims to be registered as the owner of the full eighth share originally granted to P. E. Hauman, sen. Her case is that she purchased the share in 1894 from the executors of P. E. Hauman, jun., that P. E. Hauman, jun., purchased it in 1891 from the trustees of his insolvent estate, that in 1862, before his insolvency, he purchased it from the executors of J. S. Hauman, sen., and that J. S. Hauman, sen., purchased it in 1831 from the executors of P. E. Hauman, sen. It is alleged that in each case the eighth share of Berg Rivier's Hoek was purchased along with the farm La Brie, but although the farm La Brie was duly transferred to the different purchasers there never was a corresponding transfer of the eighth share of Berg Rivier's Hoek. To explain the omission it is said that the grant to P. E. Hauman was only made in 1839, but surely if there had been a sale by the executors they could in 1839, on receiving the grant, have given transfer to the purchaser. In other respects the evidence of such a sale in 1831 appears to me to be wholly inconclusive. Mrs. Le Roux, and Mr. J. S. Hauman, jun., say that it did take place, but they do not say that they speak from personal knowledge of a transaction which is alleged to have taken place seventy-three years ago. All the parties to the supposed sale are dead, and not a single document in the shape of conditions of sale or liquidation account or otherwise is forthcoming to prove it. As to the subsequent alleged sales there is a little more semblance of proof, but in regard to none of them has the best evidence been produced. The first sale to

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P. E. Hauman, jun., is said to have been effected by himself and one Kriel as executors of J. S. Hauman, sen., but no steps were ever taken by them to obtain transfer on behalf of the estate. As to the alleged sale to P. E. Hauman, jun., after his insolvency, one of the trustees of his insolvent estate says that the insolvent bought the farm La Brie, together with all such right, if any, as he theretofore had in Berg Rivier's Hoek, but that statement is at variance with the documents produced in this case, including the written contract with the trustees. By that contract the insolvent acknowledges to have taken over from the trustees "the landed property, consisting of the farm La Brie and adjoining ground as per deed of transfer made in my favour on the 3rd September, 1862, and subject to the conditions therein contained, for the sum of £1,350." It is not alleged that the deed of transfer or conditions refer in any way to one-eighth or other share of Berg Rivier's Hoek, and it is clear that the sum of £1,350 was paid for the farm La Brie. As to the purchase by Mrs. Le Roux herself, in 1894, she states that she became the purchaser of the farm La Brie with the one-eighth share in Berg's Rivier Hoek, appertaining thereto, but she adds: "In the conditions of sale, I believe no mention was made of the share in Berg Rivier's Hoek, and I only got transfer on 7th November, 1894, of La Brie." She subsequently occupied a portion of Berg Rivier's Hoek, but I am not satisfied that she occupied one-eighth share.

At the time when Mrs. Le Roux purchased La Brie, and is alleged to have purchased part of Berg Rivier's Hoek, the petitioner was still in possession of one-sixteenth share of the latter farm. That share he was using in the full belief that he was the owner under his transfer deed of 1872, in the same way as he had before 1891 occupied one-eighth in the full belief that he was the owner of that share. The presumption is that his occupation was in accordance with his title-deeds, and this presumption is strengthened by his definite statement to that effect, and by the important fact that no objection was raised by Mrs. Le Roux or by any of his co-proprietors to his occupation of one-sixteenth share after he had transferred one-sixteenth. So far from objecting they recognised him as co-proprietor by allowing him to attend meetings as such, and to send his cattle to graze on the farm. It is said by Mrs. Le Roux in her affidavit that the farm is not fenced off in any way, so that no one of the numerous co-owners could say that he used one-eighth or one-sixteenth, and yet in a subsequent part of her affidavit she makes the definite statement that P. E. Hauman, jun., occupied and enjoyed the use of one-eighth share. As to P. E. Hauman, sen., there is no evidence that any one representing his estate occupied the whole share to which his estate was entitled, and, therefore, even if the sales relied upon by Mrs. Le Roux had been proved, I would not have been prepared to hold that she is entitled to oppose the transfer of one-sixteenth to the petitioner. But, as I have said, the evidence as to those sales is inconclusive, and her title to the whole eighth share of P. E. Hauman is not equal to—it certainly is not superior to—the petitioner's title to the one-sixteenth share claimed by him. From 1872 to 1891 he was in open, peaceable, *bonâ fide* possession as of right of

one-eighth share, and the possession thus acquired was continued from 1891 to 1903 in respect of the sixteenth share which remained to him under his transfer.

Although Mrs. Le Roux is alleged to have purchased one-eighth share as far back as 1894, she took no steps to have her title registered until 1903, when she was informed that the petitioner had obtained a rule in regard to the one-sixteenth share claimed by him. I am clearly of opinion that the petitioner, who has been in occupation for the requisite period in the full and honest belief that he was the owner, is entitled to the relief asked for, and that the rule must be made absolute with costs, such costs to be paid in equal shares by the respondents.

Schreiner, K.C. (with him *Benjamin*), for the appellants, detailed the various persons through whom portions of the farm had been derived by the present registered owners, and contended that Malherbe had not acquired any prescriptive rights as against the other co-owners of the undivided farm. Mrs. Le Roux's claim was founded on the purchase of her predecessors in title from Hauman's estate.

Burton (with him *Van Zyl*) commented on the absence of any claim being made by the other co-proprietors until Malherbe applied for title. He contended there had been separate user by Malherbe and his predecessors in title for more than the period of prescription.

Schreiner, K.C., in reply, urged that Malherbe had not made out any right to Hauman's share in the farm, while Mrs. Le Roux had done so.

Cur. adv. vult.

Postea (November 14),—

MAASDORP, J., giving judgment, said: At the hearing of the original motion in this matter, when the applicant applied to be registered as the owner of one-sixteenth share of Berg Rivier's Hoek on the ground of prescription, the respondent, Helena Le Roux, disputed his entire claim to any share in the farm, and she herself set up a claim to be registered as the owner of one-eighth. On appeal, that position was abandoned by her, and she admitted that Malherbe was entitled to some share by prescription,

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but contended that it should not go in reduction of her share, but in abatement of the shares of all the owners of Berg Rivier's Hoek. If she be entitled to more than the one-sixteenth which was allowed her in the order made by the CHIEF JUSTICE, then I think her contention is correct, that the occupation of the applicant should not be regarded in the question of prescription as an adverse holding against her particular share. It is, therefore, necessary to consider whether she is entitled to more than the one-sixteenth share awarded to her by the order. She alleges that her title to one-eighth of the farm Berg Rivier's Hoek can be traced in unbroken succession from the right thereto held by P. E. Hauman, sen. It is quite evident from the affidavits that none of the witnesses can have any personal knowledge of what occurred before 1831, and their evidence in that respect is entirely hearsay, or based on tradition. There is no legal proof that P. E. Hauman, sen., had, during his lifetime, any right to a share in Berg Rivier's Hoek, or had as of right any tenure which could by prescription have ripened into ownership. There is no legal proof that he had any right in that farm, or pretended to have any, which he could have transferred upon his death to his son, J. S. Hauman, sen. Again, it can hardly be known to any of the witnesses what occurred in 1831 after the death of P. E. Hauman, sen. Yet we have the positive statement made by Helena Le Roux that, on his death, the farm La Brie, together with one-eighth share in Berg Rivier's Hoek, belonging to his estate, was sold by public auction to his son, J. S. Hauman, sen. In this she is supported by J. S. Hauman, jun., the grandson of P. E. Hauman, who could not seventy-three years ago have been of an age to speak positively as to what then occurred. But if Malherbe is to be believed, these statements as to Berg Rivier's Hoek must be incorrect, because it appears from search in the Master's Office that the farm La Brie was bequeathed by P. E. Hauman, sen., in his will, to his son, J. S. Hauman, sen., and no mention is made in the will of any place in the Berg Rivier's Hoek farm. If that be so, we have documentary evidence to set off against hearsay statements, and proof that nothing passed to J. S. Hauman, sen., in respect of

the farm Berg Rivier's Hoek, nor is there any evidence that he had any right to the farm which could be passed to his son. In 1839, the first authentic proof of title to Berg Rivier's Hoek is discovered. In that year the Government granted Berg Rivier's Hoek in eight undivided shares so P. E. Hauman, the owner of La Brie, and seven other owners of seven neighbouring farms. If J. S. Hauman, sen., was at that time entitled to the one-eighth by succession to his father, it is difficult to see why the grant was not made to him, or why he did not secure his rights. It is, on the other hand, easy to understand that he could have made no claim under this grant if he purchased La Brie, and nothing more. This grant to P. E. Hauman in 1839 disposes of all idea of prescription, before 1839, in those who pretend to claim through him. But it is said that from 1839 to 1862 J. S. Hauman, sen., used and occupied one-eighth share of Berg Rivier's Hoek as of right, and prescription was, therefore, running in his favour during that period. The evidence upon this point is of a very doubtful character, since the witnesses upon this point can hardly give us, as of their own knowledge, any positive statements as to his intentions at the time. But for the present I shall leave this part of the case there. H. Le Roux says that in 1862 the executors of J. S. Hauman, sen., sold at public auction the farm La Brie, together with one-eighth share in Berg Rivier's Hoek, appertaining thereto, to P. E. Hauman, jun. Malherbe says the records filed in the Master's Office contradict this, and that the liquidation accounts filed in the estate show that the farm La Brie was sold to P. E. Hauman for £1,500, and Berg Rivier's Hoek ground to one P. A. Le Roux for £549. This share in Berg Rivier's Hoek the said J. S. Hauman had transfer of, and no mention is made of any other share in the said farm. This piece of documentary evidence would have the effect of showing that no share in Berg Rivier's Hoek was sold to P. E. Hauman, jun., and also that when J. S. Hauman, sen., occupied Berg Rivier's Hoek, he did so in respect of a share other than the one in dispute. This would weaken the evidence of prescription between 1839 and 1862. If P. E. Hauman, jun., purchased La Brie only in 1862, he could not have occupied Berg Rivier's Hoek

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by virtue of such purchase, and his intention to do so is doubtful when we find that he had other shares in Berg Rivier's Hoek, bought in 1868, 1885, 1883. Then it is stated that in 1891 two and a one-eighth shares of Berg Rivier's Hoek were sold in the insolvent estate of P. E. Hauman, and that he himself bought out of the estate the farm La Brie and the one-eighth share appertaining to it. Here, again, upon reference to the agreement between him and the trustees, we find that La Brie and adjoining ground is mentioned, but nothing said of the one-eighth share. Up to this point there is no clear proof that the title to one-eighth of Berg Rivier's Hoek passed to the successive owners of La Brie; on the contrary, there seems to be pretty strong proof that it did not. Nor is there proof that, independently of title, the successive owners of La Brie occupied Berg Rivier's Hoek in a manner which made prescription run in their favour. When we come finally to the sale to the respondent, H. Le Roux, it would seem that at the sale by the executors of P. E. Hauman, jun., there was some idea that some right to an eighth share in Berg Rivier's Hoek did exist, and such right was sold for whatever it was worth. It is only too probable that the executors would not have made themselves responsible for more, in view of the doubtful and uncertain nature of the right. I do not think H. Le Roux has established a right to one-eighth of Berg Rivier's Hoek, and, considering the doubtful and hazy nature of her claim, she should have been well content with the one-sixteenth share awarded to her, to which there was no other claimant. It is admitted now that the applicant is entitled by prescription to a share in the farm. It was found that his prescription ran in respect of one-sixteenth of the farm, and there being one-sixteenth to which no title in any other farm is set up, I think the applicant is entitled to have it registered in his name. The appeal must therefore be dismissed, with costs.

HOPLEY, J., said: About the year 1800 Pieter Edward Hauman, sen., and seven others, acquired possessory rights in equal undivided shares over the farm Berg Rivier's Hoek. At that time the said Hauman was the

owner of the farm La Brie, and it is alleged that he and the other possessors of Berg Rivier's Hoek had acquired the latter farm as a grazing ground for their cattle. They continued to possess it in undivided shares, but no title was granted to them during the lifetime of the said Hauman, who died in the year 1830. On his death his son Johannes Stephanus Hauman, sen., acquired La Brie, and transfer of that property was passed to him in 1831. The appellant alleges that J. S. Hauman acquired La Brie by purchase from his deceased father's estate together with his father's rights over Berg Rivier's Hoek; but there are no documents to support these allegations; and, even if it be conceded that he purchased La Brie and got title thereto by virtue of such purchase, there can be nothing save tradition or conjecture as to the simultaneous purchase by him of rights over Berg Rivier's Hoek. The respondent, however, disputes the fact of the purchase even of La Brie, and says that Johannes Stephanus Hauman acquired that property as a bequest under his father's will, and that the said will was silent as to Berg Rivier's Hoek. This is not admitted by the appellant, and the Court is left in doubt as to which of the two versions is the correct one. Nine years after the death of Pieter Edward Hauman, sen., to wit, in the year 1839, title was at length issued to him and the other co-owners. As he was dead his rights under the grant vested in his executors, and if there had been a purchase by, or bequest to, his son Johannes Stephanus of such rights, the executors would in all probability either voluntarily or on compulsion have passed transfer to such son. But nothing of the kind was done; and though Johannes Stephanus Hauman did acquire another one-eighth share in Berg Rivier's Hoek of which he duly got transfer, he never seems to have made any attempt to obtain transfer of the one-eighth which was registered in the name of his deceased father, and to which it is alleged he had acquired the right by purchase from his father's estate. As it is clear that the appellant to make good her case must trace her rights through Johannes Stephanus Hauman, sen., his conduct in the matter, both as to his omission to get transfer of the one-eighth from his father's estate, and as to his purchase and getting

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transfer of another one-eighth, seems to me to be both significant and important. Johannes Stephanus Hauman, sen., died in 1862, and if the representatives of his estate were before the Court making a claim that this one-eighth share should be adjudged to them, would it be possible for the Court, in the face of any opposition, to support such a claim ? That is, however, precisely the position, since the appellant claims, and must claim, through this predecessor, the nature of whose rights is based on evidence which is vague and inconclusive. There are other weak spots in the claim by which the appellant seeks to establish her right, notably the purchase by P. E. Hauman, jun., of La Brie after his insolvency in 1891, which is alleged to have included this one-eighth share in Berg Rivier's Hoek ; but the written contract of sale by the trustees of his insolvent estate to P. E. Hauman, jun., contradicts this, and the Court is asked to hold that a written contract should be varied and added to disputed parol evidence. The fact is that no one took transfer of the original one-eighth share granted to P. E. Hauman, sen., in 1839, and that the various successive owners of La Brie, without enquiring into the matter and without opposition from any one, continued to send their cattle from generation to generation to graze at Berg Rivier's Hoek. Frequently they owned individual shares in that property; in fact, it is in one of the affidavits alleged that from and during the time of J. S. Hauman, sen., they have never been without a share registered in their names, and they seem at certain periods, or after a certain period, to have acquired an impression that La Brie had rights over Berg Rivier's Hoek, the latter being a servient and the former a dominant tenement. That may account for their conduct, and for vague assertions of concomitant rights at successive sales of the farm La Brie. It is clear, however, that the one property is legally independent of the other, and it seems to me that the one-eighth share of the original P. E. Hauman has been lying derelict in law since his death in 1830. The respondent has, it is clear, acquired by *bonâ fide* prescription a one-sixteenth share in the farm, and it seems to me that it should be taken from the one-eighth that has been so derelict. Of course,

if the appellant had established her clear right to the whole of that one-eighth Mr. *Schreiner's* contention that all the various shares should abate proportionally to make room for the respondent would have been irresistible; but in the circumstances, I am of opinion that the judgment should be affirmed without any variation.

DE VILLIERS, C.J.: My reasons for the judgment appealed against have been fully stated, and it is not, therefore, necessary for me to add many remarks to those of my learned brethren. The petitioner claimed a right by prescription to one-sixteenth share of the farm by virtue of his occupation of such sixteenth undivided share during the full prescriptive period. In the Court below it was contended for Mrs. Le Roux that property held in common could not be acquired by prescription, but on appeal this contention was abandoned by her Counsel. "*Locus certus*," says Pomponius (Dig., 41, 2, 26), "*ex fundo et possideri et per longam possessionem capi potest, et certa pars pro indiviso, quæ introducitur vel ex emtione, vel ex donatione, vel qualibet aliâ ex causâ.*" It was clearly proved that a definite although undivided share was occupied as of right by the petitioner, and as the possession was open, peaceable, and *bonâ fide*, he is entitled to claim registration of such share.

Appeal dismissed accordingly, with costs.

[Appellant's Attorneys, WALKER & JACOBSOHN.
Respondent's Attorney, VAN DER BYL.]

BOSMAN, POWIS & Co. *vs.* NORDEN.

Liquor Licence.—Removal of Business.—Transfer of Licence.

The plaintiff N., owner of the property upon which were two hotels for which he held liquor licences, sold the lease of the premises, the licences, goodwill, furniture, and all contents of the hotels, and executed a lease thereof for five years, with a right of renewal for another

five years, to and in favour of the defendants, B. P. & Co., who obtained a transfer of the licences to themselves. Plaintiff afterwards was compelled to call a meeting of his creditors, at which meeting defendants claimed the licences as their own property, which they could have transferred to other property, and that they were not bound to hand back the leased premises as licensed premises. Held,—*affirming the judgment of the Divisional Court, that the defendants had no right, during the currency of the lease, to remove the business and the licences connected therewith to other premises.*

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The plaintiff Norden, owner of certain property at Kuils River, upon which were two hotels known as the Old Standard Hotel and the Nil Desperandum Hotel, both of which were licensed for the sale of liquors, entered into a contract of sale and lease of the premises to the defendants, Bosman, Powis & Co. Defendants claimed the right to remove the licences from the leased premises to their own premises, and this action was brought to have declared the respective rights of the plaintiff and the defendants in the licences. The trial took place in a Divisional Court before Mr. Justice HOPLEY, who gave judgment on the 15th November, 1904, in favour of the plaintiff, whereupon the defendants appealed.

The questions at issue and facts proved are set forth, in His Lordship's judgment, as follows :—

In December, 1902, the plaintiff purchased two hotels at Kuils River, known as the Old Standard and the Nil Desperandum. These were both licensed to sell liquor, and had been long established as licensed premises, a fact which, it is alleged, added very largely to their value. They are the only licensed houses in that neighbourhood, and evidence has been given which proves to my mind that it would be very difficult for anyone to obtain a fresh licence in that neighbourhood. In these circumstances I am convinced that a very large proportion of the selling or letting value of these two properties is dependent on the licences which are at present attached to them. The plaintiff received possession of his two hotels, spent a considerable sum upon them in improvements, and carried on business in them for nearly a year, the licences having duly passed to him. In October, 1903, the defendants, through the broker Joseph, entered into a contract partly of purchase and partly of lease, for which a broker's note was passed on 22nd October, which must be taken as setting forth the terms of the

agreement between the parties. It is in the form of an ordinary bought and sold note, and under its terms defendants buy and plaintiff sells "the lease, licences, goodwills, furniture and all contents, and the whole as a going concern, of and in the Old Standard Hotel and the Nil Desperandum Hotel, Kuils River, for the sum of £11,000, upon certain terms and conditions." The first of these conditions is that the seller shall grant a lease to the purchasers of the two aforesaid "licensed premises" for a term of five years reckoned from 15th November, 1903, at a monthly rental of £35, with an option to the purchasers to hire the said premises for a further period of five years (after the expiration of the first five years) at a rental of £50 per month. Certain arrangements as to the payment of the £1,000 were stipulated for, and possession of the premises and transfer of the property bought was to be given and taken on 15th November. Certain alterations to the bar and canteen in the Old Standard Hotel, which were to be made by the seller forthwith at his sole expense, in the premises hired, were described. Further conditions were that the seller should pay the brokerage, that the lease should be drawn up in terms of the broker's note and duly stamped, the broker's note to be attached thereto, and that all expenses incurred in connection with drawing leases and transferring the licences from the seller to the buyers should be equally shared by the contracting parties; the seller was to keep the outside of the premises in repair and the purchasers the inside; and the purchasers were to hand back the premises to the seller on the termination of the lease in good condition, fair wear and tear excepted. After the conclusion of the contract the plaintiff caused a lease to be prepared safeguarding the rights of his premises as licensed premises, and stipulated that the licences should at the expiration of the lease be handed to him; but the defendants refused to sign such lease, and insisted that it should be in terms of the broker's note. There was some disagreement and correspondence on this point, but eventually in March, 1904, the plaintiff, who had meanwhile put the defendants into possession as agreed upon, accepted and signed the lease which is attached to the declaration in the case, which purports to be entered into in furtherance of the broker's note (which was attached) and on the understanding that it should exist on the conditions and stipulations mentioned in the said broker's note. "The desire of the parties being that the clauses and stipulations of the said note affecting the said lease should be considered as inserted." It will thus be seen that the plaintiff fulfilled literally the conditions in the broker's note, that the lease should be drawn in terms of the said broker's note, and the effect of the contract as set forth in the broker's note and subsequent lease, in so far as the power to deal with the licences and the licensed premises is affected, is a matter about which the Court is asked to give a decision in the action. It appears that the defendants claim that under the contract, as drawn, they purchased the entire ownership in and control over the licences, and all the licence rights of the two hotels, and that they are entitled, if they please, at any time before the expiration of the lease, to have the licences transferred in accordance with the provisions of the Liquor Licence Laws, out of the said premises into any other

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premises in the neighbourhood to which they may obtain the leave of the constituted authorities to make such transfer. This claim which the defendants openly make and maintain is seriously affecting the value of these two hotels, and is causing present actual loss and damage to the plaintiff, who, in consequence, has come to the Court for relief. The defendants found their pretension upon the wording of the broker's note, by virtue of which they claim that they bought the licences of the two hotels. What, however, is implied by such words? The licences which they so purchased were personal licences to the plaintiff to sell intoxicating liquor at these two hotels, for the then current year, and the utmost that the plaintiff had the power to dispose of was the right or obligation on his part to apply for a temporary transfer of such licence to his lessees. The 56th section of Act 28, 1883, enacts that any person being the holder of a licence who shall during the currency thereof sell or dispose of his business or the house or premises in the respect of which such licence was granted, may make application to the Resident Magistrate for the temporary transfer of such licence to the purchaser of such business, or to the purchaser or lessee of such premises; and the Magistrate and any two members of the Licensing Court may, if they think fit and upon proof of payment by the applicant of the sum prescribed by such transfer, by memorandum endorsed on the original licence, grant temporary transfer of such licence accordingly. The sale of a business of this nature is, no doubt, a matter of frequent occurrence, and the transference of the licence is regulated by the provisions of the above-quoted section in all such transactions, and would seem to follow almost as a matter of course if the premises were leased, or the business taken over by a newcomer. I attach, therefore, no particular importance to the mention of the word "licences" in the broker's note. They would have certainly passed with the lease and the goodwills, or with either lease or the goodwills of the two hotels, for it is not suggested that the licensing authorities would have raised any objection to the defendants, and, in fact, the licences have been duly transferred to and renewed by them. Does the fact that the goodwills of the hotels were purchased make any difference in the position? The goodwill of a hotel business seems to me to be simply the right to supply the public, especially such members of the public as are in the habit of frequenting the hotel, with accommodation, food, and liquor, and that would, of course, pass with the lease of the premises, where the lessee takes up the business as a going concern, as was pointed out in *Ex parte Punnett*, L.R., 16 Chy. Div., p. 226, in which JESSELL, M.R., said: "It is quite plain that the goodwill of a public-house passes with the public-house. In such case the goodwill is merely the habit of the customers resorting to the house." To give a fair construction to this contract it seems to me that it should be looked at as a whole. It is true that there are certain articles of a tangible and material nature, such as the furniture and contents of the hotels, which undoubtedly were sold out and out, and of which the ownership has entirely passed to the defendants, and it is likewise true that they have passed by virtue of the same sentence and the same phrase in the contract as deals with the licences of the hotels; but

though that is so, it does not seem to me to follow necessarily that ownership in such tangible moveable property, and in the rights comprised in such things as licences and goodwills, passes in the same way. From the terms of the contract it is clear that the hotels were taken as licensed premises and as going concerns, and that they were so taken on lease for a limited period of either five or ten years. It seems to my mind to have been clearly contemplated that they should be leased, hired, and treated as hotels, and as going concerns throughout the currency of the lease, and that they should be returned at the expiration of the lease as far as possible in the same order and condition. To hold that the licences may, under the existing contract, be transferred from these licensed premises, would be equivalent to holding that they might, on the expiration of the lease, be handed back, not as going concerns with a business attached to them, but as concerns which have been stripped of the only thing which would possibly keep them going. Apart from the serious depreciation in value that such a result would entail on the properties, it seems to me to be a wholly inequitable reading of the contract. With regard to the alternative prayers in the declaration for the rectification or nullification of the contract on the grounds of error and misunderstanding, I am of opinion that no relief could be granted to the plaintiff. He accepted a certain contract and must abide by it whatever its true legal construction may be. As to the first prayer that he makes, it seems to me to go beyond what the Court is at present in a position to order or to regulate. Some of the contingencies therein contemplated may never arise, and, if they should, they had better be dealt with by the light of the then existing circumstances. The Court, however, is in a position to declare, and does declare, that the defendants are not entitled to the benefit of the said licences or renewals thereof, save during the currency of the said lease, or renewal thereof, and that they are not entitled at any time to transfer the said licence or renewals thereof from the said premises. The defendants must pay the costs of this action.

Burton (with him *Roux*), for the appellants, submitted that the respondent must stand or fall by the contract evidenced by the broker's note and lease. The effect of the contract was to transfer the liquor licences. This was shown also by the representations made to appellants. The custom of the trade was for the owner of property to protect himself by stipulating for the return of the licences. In the absence of a special agreement the licences belonged to the lessee, not to the owner of the property. One person owning the premises and another the licence was recognised by section 9 of Act No. 44, 1885. (*Ohlsson's Cape Breweries* vs. *Power*, 10 Sheil, 747; *Ohlsson* vs. *Estate Kuhr*, 11 Shiel, 165; *Ohlsson* vs.

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Parsons, 11 Sheil, 233; Act No. 28, 1883, section 61; *Maw* vs. *Hindmarch*, 28 L. T., n.s., 644.)

Sir Henry Juta, K.C. (with him *Gardiner*), for the respondent, contended that section 8 of Act No. 44, 1885, was intended to protect the owner of the property. It differed from the English statute, and this and other particulars distinguished this from *Maw's* case. A licence cannot be sold (Act No. 28, 1883).

Burton replied.

DE VILLIERS, C.J.: I quite agree with Mr. *Burton* that the decision of this case depends upon the construction of the agreement of lease executed between the parties; and that the construction of that agreement depends upon the terms of the broker's note, which has been incorporated with the agreement. The broker's note, no doubt, uses the words, "bought from Joseph Norden and sold to Bosman, Powis & Co., the lease, licences, goodwill, furniture and all contents," and so forth, for a certain price, but it is clear that it is not the premises that were sold, but the right to have a lease of the premises executed in terms of the subsequent part of the broker's note. If this had been an out-and-out sale, there would have been no difficulty whatever, because there can be no doubt that the sale would have carried the goodwill. The question was considered by the Court of Appeal in England in the case of *Ex parte Punnett*. In that case the Master of the Rolls said: "It is quite plain that the goodwill of a public-house passes with the public-house. In such a case the goodwill is the mere habit of the customers resorting to the house. It is not what is called a personal goodwill." In the present case, however, there was no sale of the premises, but there was a lease of the premises for five years, with a right of renewal for another five years. Now what was leased? Not merely the premises, but "the whole as a going concern, of and in the Old Standard Hotel and the Nil Desperandum Hotel, Kuils River." Two houses were included in the lease. The question arises whether the lessee during the currency of this lease was entitled to take active steps, by means of

which these premises will cease to be hotels, and will cease to enjoy the benefit of the licence. In my opinion, it is clear from the contract that he should not be allowed to do so. It would be quite inconsistent with the terms of this contract that he should be allowed to do that during the currency of the lease. It is another question whether he should be allowed to be perfectly passive and do nothing, and thus risk the loss of the licence on that account. That question does not arise for adjudication. But I am clearly of opinion that active steps he should not be allowed to take, because it would be quite contrary to the implied terms of this contract. Great stress has been laid on the fact that the words "bought and sold" are used, but it is clear that the licence which is there said to be sold could not be sold *qua* licence, and that the goodwill which was sold was the goodwill of the leased premises. In the same way as the goodwill of the public-house, according to the Master of the Rolls in the case quoted, so the goodwill would go with the lease, it would not extend beyond the term of the lease, and, in my opinion, it will be inconsistent with the contract for the lessees to deal with the goodwill and the licence in such a manner as to deprive the owner of the premises, at the expiration of the lease, of his rights. If, at the expiration of the lease, there is a licence still in existence, the lessor, in my opinion, will be entitled to that licence, and the lessee could not be allowed during the currency of that lease to do anything actively by means of which the licence or goodwill is transferred to any other place. The Court is aware of the great difficulty which the Legislature has thrown in the way of acquiring fresh licences. There are a great many requirements before fresh licences can be issued, there may be a majority of the ratepayers that must consent, and the Court may certainly take judicial cognisance of the fact that there does exist the greatest difficulty in obtaining fresh licences. If, therefore, the defendants were now to be allowed to transfer what is described as the Old Standard Hotel and the Nil Desperandum Hotel to two other premises, and thus deprive these particular premises of the real value which they possess, I think it would be clearly contrary to the contract entered into. For these simple reasons, I am of

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opinion that the judgment was right, and that the appeal must be dismissed, with costs.

BUCHANAN, J., and MAASDORP, J., concurred.

Appeal dismissed accordingly, with costs.

[Appellants' Attorneys, ZIETSMAN & BOSMAN.
Respondent's Attorneys, SILBERBAUER, WAHL, & FULLER.]

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Municipal Regulations.—Ruinous and Dilapidated Buildings.—Powers of Council.—Damages.

The Municipal Regulations of Port Elizabeth provided that "where a building is considered by the Council to be ruinous or so far dilapidated as thereby to have become and to be unfit for use or occupation," the Council may, on failure by the owner to obey an order for its demolition, proceed to demolish the building, and to claim the outlay from the owner. Held,—*in an action by the Council for the cost of demolishing certain cottages belonging to appellant, that the Council had no power, under the above referred to Regulations, to demolish buildings which were structurally fit for use and occupation, although from a sanitary point of view they were not so fit.*

In ordering the demolition of the cottages the Council acted bonâ fide, *and in the interest of the inhabitants of the town, at a time when the plague was raging there; and the appellant was proved to have been generally neglectful of his duties as landlord.* Held,—*on the appellant's claim in reconvention for damages for wrongful demolition, that in the absence of any circumstances of aggravation, the measure of damages which should be applied was the diminution in the selling price of the land by reason of the unlawful act of the Council.*

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These were cross-appeals against the decision of the Court of the Eastern Districts in an action brought by the Town Council of Port Elizabeth against the defendant Reed.

The plaintiff's declaration first claimed payment of certain municipal rates assessed upon property owned by the defendant. After declaration, and before plea, this claim was settled, and was not further considered. The declaration then continued:

"5. On 25th March, 1903, the Council made an order as they lawfully might in terms of section 37 of the Municipal Regulations appertaining to buildings (which Regulations were in force before the passing of the said Act, and were re-enacted in section 210 of the said Act), requiring defendant to demolish, before 8th April, 1903, certain dirty, insanitary, and dilapidated buildings, his property—namely, six double-storied and five single-storied tenements situate between Humphrey and Barrack Streets, in the Municipality of Port Elizabeth, and commonly known as the 'Red Barracks.'

"6. Defendant had notice of the said order on 31st March, 1903, but neglected to demolish the said buildings by the time appointed.

"7. Thereupon the Council, as they lawfully might in virtue of sections 37 and 38 of the aforesaid Regulations, caused the said buildings to be demolished by their servants, and incurred expenses in and about the demolition and removal of the same to the amount of £37 10*s*. 3*d*., particulars of which are set forth in the copy of account hereto annexed marked 'A.'

"8. In terms of section 39 of the said Regulations defendant became liable to the Council for the said amount of £37 10*s*. 3*d*., but he has refused to pay this sum."

Wherefore the plaintiffs prayed judgment for the sum of £37 10*s*. 3*d*., due for labour done and expenses incurred by the Council on defendant's behalf, general relief, and costs of suit.

To this the defendant pleaded:

"3. With regard to paragraphs 5, 6, and 7, the defendant admits that he received the order therein referred to and that he refused to comply with the same, and that the plaintiffs demolished the said buildings;

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but denies liability for the cost of the said demolition for the reasons hereinafter set forth.

" 4. In or about the month of September, 1901, the said buildings were closed by order of the Plague Board of Port Elizabeth, acting in conjunction with the plaintiffs, and thereafter, to wit, on or about the 2nd February, 1902, the plaintiffs passed a certain resolution whereby the defendant was allowed to put the said buildings in a proper state of repair.

" 5. The defendant has at all times been ready and willing to effect the said repairs, but the plaintiffs, during or about the said month of February, 1902, have retained the key of the said building in their possession, and, though frequently thereto requested, have refused and neglected to deliver the same to defendant for the purpose of effecting the said repairs.

" 6. The defendant further says that if the said buildings were in a dilapidated and insanitary condition prior to the demolition thereof, the same was attributable to the default and neglect of the plaintiffs while the said buildings were under their control, and more particularly to the action of the plaintiffs in raising the level of the streets adjoining the said building above the foundations thereof without making proper provision for the carrying off of surface water and rubbish; and defendant says he is in no way responsible therefor.

" 7. And for a further and special plea the defendant says that the regulation conferring power upon the plaintiffs to take down a neglected building or structure is *ultra vires*.

" 8. The defendant denies in the premises that he is liable for the cost of the demolition of the said buildings, and prays that plaintiffs' claim may be dismissed with costs."

And for a claim in reconvention, the defendant referred to the above allegations, and continued:

" By reason of the plaintiffs wrongful and unlawful actions therein referred to the defendant was prevented from putting the said buildings in a proper state of repair, and has been deprived of the rents thereof from the month of February, 1902; and the said buildings have become wholly lost to the defendant.

"The value of the said buildings destroyed as aforesaid was £3,000; and the rent which defendant would have received therefor is £35 per month, or £1,085, from February, 1902, to the present time.

"Wherefore the defendant (now plaintiff) prays judgment for the said sums of £3,000, and £1,085; interest thereon *a tempore morœ;* alternative relief; and costs of suit.

The plaintiffs' replication was as follows:

"1. Plaintiffs admit paragraph 2 of defendant's pleas; they deny paragraphs 6 and 7.

"2. As regards paragraph 4, plaintiffs deny that they acted in conjunction with the Plague Board in closing the said buildings, and say that the Plague Board closed them on its own authority. Plaintiffs admit having passed the resolution of 5th February, 1902, to which defendant refers, and crave leave to refer this Honourable Court at the trial to the terms thereof. They say further that such buildings were not put into a proper state of repair within two months of the passing of the said resolution.

"3. Plaintiffs deny paragraph 5, save that they admit, firstly, that the keys of the said buildings were in the possession of the Municipal Sanitary Office, which had borrowed them from the Plague Board for purposes of inspection for a portion of two days, namely the 5th and 6th February, 1902; and, secondly, that on the 6th February, 1902, defendant applied for the said keys to the said office. Defendant was then informed that the keys had been handed back by the said Office to the Plague Board, as was actually the case.

"4. Wherefore plaintiffs, save as herein admitted, join issue with defendant on his plea, and again pray for judgment in terms of prayers (b) and (c) of their declaration."

For a plea to the claim in reconvention the plaintiffs denied liability for any loss which the defendant might have incurred through the demolition of the buildings, and joined issue thereon.

Considerable evidence was led at the trial, the material points of which are sufficiently set forth in the reasons for judgment given below. In the event the Court gave

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judgment for the defendant on the claim for reconvention for £5, and ordered each party to pay its own costs. The plaintiffs appealed, and the defendant cross-appealed.

KOTZÉ, J.P., after referring to the pleadings, continued :

It will be seen from the evidence that there were two sets of buildings known as the "Red Barracks"—viz., a set of single-storied cottages in Humphrey Street, and a row of double-storied cottages in Barrack Street. So far as the single-storied buildings are concerned, it appeared from the statement of one of the defendant's own witnesses (Josephus Winter) that the defendant informed him these single-storied cottages were useless and past repair, and so the witness also found them. The defendant's counsel, therefore, abandoned all claim in respect of these cottages. Accordingly we need now only confine our attention to the double-storied cottages in Barrack Street. The Town Council, as will appear from the evidence, based its case mainly on the fact that the premises were in an insanitary and uninhabitable condition, chiefly caused by dampness, and not by reason of any structural defect in the buildings themselves. Thus Dr. Galloway, the principal witness for the plaintiffs and medical officer of health, said, *inter alia* :—"I speak from a sanitary point of view rather than from the standpoint of an architect." So the town engineer, Mr. Butterworth, confined his evidence chiefly to the fact of dampness causing the uninhabitable state of the buildings at the particular spot and locality. In like manner Dr. Rees, the senior plague officer, stated the premises were insanitary and unfit for human habitation. The chief sanitary inspector, Kemp, made the impression upon my mind that he allowed his personal feeling to influence him to a certain extent. While stating that the buildings could not be put into a habitable state of repair, he admitted that the repairs, which Mr. Curtis (on behalf of defendant) had suggested, would have put the premises in better repair than other buildings which had been left standing by the Town Council. There is also the evidence of the Town Council's witnesses (Martin and Anderson), who have known the premises for many years, and they both agree that the locality or neighbourhood, where these Red Barracks are situated, has become much drier than it used to be. It is true that some of the plaintiffs' witnesses speak of the buildings having been dilapidated as well as insanitary and unfit for human habitation, but the point for decision, so far as the Upper Red Barracks are concerned, appeared to me to be whether, in view of Regulation 37, on which the Town Council relied, it can be said that these buildings or double-storied cottages were so far dilapidated that they were dangerous or ruinous in a structural sense. After hearing the evidence for the defence, and especially the statement of Grant, Wells, and Winter, who are all experienced builders and contractors, as well as the evidence of Mr Curtis (witnesses on whose testimony I placed great reliance), I came to the conclusion that the Upper Red Barracks were not ruinous or so far dilapidated in a structural sense, nor that there

was any danger in that respect to any one inhabiting them or to neighbours or passers-by. By means of ordinary repairs and the placing of a proper damp course these buildings could have been easily put in a habitable state and condition for white workmen and respectable coloured people to occupy, a purpose for which they were well suited and probably intended. In addition to this there was the fact that these Red Barracks had been there for very many years, that Mr. Grant who inspected them carefully found no cracks in the foundation, that the ground is drier now than formerly, and that the Town Council itself thought the buildings could be repaired in the ordinary way, and gave defendant two months in which to do so. Moreover, other similar buildings were left standing in the neighbourhood by the Council, although notice of demolition had been given by the Town Council to the owner, as, for instance, in the case of the witness Wells. I therefore came to the conclusion that the buildings in question could not fairly and reasonably be said to have been ruinous or so far dilapidated as to bring them within the meaning of sec. 37 of the Municipal Regulations of Port Elizabeth. The power given by this section is one which must be carefully exercised by the Town Council, and should not be carried out unless the circumstances fairly and justly warrant such a course. The Council was not without a remedy in the matter. If satisfied that the buildings were really unfit for human habitation an ample remedy is supplied by sec. 33 of the Municipal Regulations, which provides for the closing of such buildings under an appropriate and sufficient penalty. As regards the cottages known as the Upper Red Barracks, therefore, I was of opinion that the right of the defendant, as owner, had been interfered with and violated by the Town Council.

In respect of the claim in reconvention for £3,000 and £1,085, it appeared to me that this claim was altogether excessive. One of the defendant's own witnesses, Mr. Winter, stated that the ground without the buildings would carry a better price than with the buildings. I was satisfied that land in that locality was most adapted for the purpose of stores, and was therefore valuable chiefly on that account. In addition to this the defendant took no steps to prevent the Town Council from pulling down his buildings. He could easily have applied for an interdict. The complaint that he was kept out of possession of the buildings by the Town Council could not be accepted, for upon the evidence the Plague Board, a body beyond control of the Town Council, had closed the buildings and kept the key.

In the result it seemed to me that, assuming the right of the Town Council to demolish and pull down the single-storied cottages situate in Humphrey Street, and allowing the Council the sum of £10 on the account of £37 10*s.* 3*d.*, the defendant had also sustained some damage for the invasion of his right, so far as the double-storied buildings in Barrack Street were concerned. While I did not think the defendant had made good his claim to the extent put forward by him, he was yet entitled to some damage, and the sum of £15 seemed to me as sufficient. Deducting the £10 in favour of the Town Council, a sum of £5 remains, for which the Court gave judgment in favour of the defendant. In the

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exercise of its discretion the Court directed that under the circumstances each party should pay its own costs.

SHEIL, J., said :

In the view which I take of this case, it is only necessary to consider the defence that the action of the Council, in demolishing the buildings in question, was *ultra vires*. It has been contended, on behalf of the plaintiffs, that, owing to the insanitary condition of the premises, the result of dampness, the Council was justified, under sec. 37 of the Municipal Regulations, in demolishing the six houses known as the Upper Red Barracks on failure by the defendant to comply with the order of 25th March, 1903. I confine my remarks mainly to the Upper Red Barracks because very little in the way of demolition had to be done in connection with the Lower Red Barracks, as, according to the evidence of the Council's assistant sanitary inspector Newman, the five small cottages forming the Lower Red Barracks had almost fallen to the ground when he began his work ; and, whatever expense was incurred in connection with these five cottages must have formed a very small proportion of £37 10*s.* 3*d.* which the Council seeks to recover under sec. 39 of the Regulations, and the real dispute between the parties is as to whether the Council had the power to demolish the Upper Red Barracks. Assuming that the Upper Red Barracks were in an insanitary condition on 25th March, 1903, the point which the Court has to determine is whether under the 37th Regulation the Council was justified in demolishing these buildings.

The Council, in my opinion, was not justified in taking that step. Regulation 37 makes no mention of buildings that are in an insanitary condition, nor does that section give the Council the power, which has been contended for in this action, with regard to insanitary buildings. If the buildings in question were in an insanitary condition, the Council could either have taken proceedings under sec. 33 of the Regulations, or under sec. 22 of the Regulations, framed under sec. 7 of the Public Health Amendment Act, 1897 ; but it had no power to adopt the extreme measure of demolishing those buildings. Regulation 37 has reference to buildings which are considered by the Town Council to be ruinous, or so far dilapidated as thereby to have become unfit for use or occupation, or are, from neglect or otherwise, in a structural condition prejudicial to the property in or the inhabitants of the neighbourhood. In the present case, the buildings in question were demolished, not because of their structural defects, if I correctly understand the evidence of the Council's medical officer of health, engineer, and sanitary inspector, but because they were unfit for use or occupation from a health point of view ; and, on these latter grounds, no power is given to the Council under Regulation 37 to demolish buildings.

Such being the case, the defendant's rights have been invaded, and the next question to be considered is the amount of damages to which he is entitled. The defendant claims £3,000 in respect of the buildings, and £1,085, being loss of rent. I am satisfied, upon the evidence given on behalf of the defendant, that the damages claimed are most excessive.

Mr. Winter, the defendant's own witness, made a valuation of these houses some eighteen months ago, when property was at its highest in Port Elizabeth ; and, in making his valuation, he treated the buildings, apart from the land, as being only worth the value of old material. And he has expressed the opinion that the land without the buildings would bring a better price in the market than if they were still standing. This witness was himself a builder and contractor for twenty-two years. He is one of the valuators of the Town Council, and must be intimately acquainted with the value of landed property in Port Elizabeth.

With regard to the claim for rent, I am satisfied, bearing in mind the condition of these buildings, that it would have been impossible to obtain tenants for them during the period for which rent is claimed.

I am consequently of opinion that the defendant is merely entitled to nominal damages, and that these damages should not exceed £5.

As both plaintiff and defendant have failed in establishing their claims, I am of opinion that each party should be ordered to pay his own costs.

Searle, K.C. (with him *Percy Jones*), for the Town Council, submitted that the Municipal Regulation No. 37 justified the action of the Council. The Regulation was in the following terms :

37. Where a building or structure is considered by the Town Council to be ruinous or so far dilapidated as thereby to have become, and to be, unfit for use or occupation, or is from neglect or otherwise, in a structural condition prejudicial to the property in, or the inhabitants of the neighbourhood, the Town Council may issue an order requiring the owner, agent, or occupier of such building or structure referred to as a neglected building, to take down, or repair, or rebuild the neglected structure or any part thereof, or to fence in the ground on which it stands or any part thereof, or otherwise to put the said building or structure or any part thereof in a state of repair or good condition to the satisfaction of the Town Council, within a reasonable time to be fixed by the Town Council. If the order is not obeyed, the Superintendent of Works or other duly authorised officer may with all convenient speed enter upon the neglected structure or such ground as aforesaid and execute the order.

The bad condition of the buildings was fully proved. The subsequent Regulations entitled the Council to recover from the owner the costs incurred. The Regulation applied to buildings which were ruinous "or" dilapitated. "Dilapidated," in this context, was equivalent to a "radically bad state of repair." (*Vide* the *Standard Dictionary*, *Walton's Law Lexicon*, *Stroud's Dictionary*, &c.).

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Burton (with him *J. E. R. de Villiers*) was heard on the cross-appeal relative to the question of damages, contending that there had been an invasion of right as well as substantial loss suffered. (*Sedgwick on Damages*, p. 116.)

Searle, K.C., replied.

Cur. adv. vult.

Postea (March 6),—

DE VILLIERS, C.J., in giving judgment, said: In this case there is an appeal, as well as a cross-appeal, against a judgment of the Eastern District Court. The question which arises on the appeal is whether the plaintiffs, the Town Council of Port Elizabeth, were justified in demolishing certain buildings belonging to the defendant, and known as the Upper Red Barracks. The question which arises on the cross-appeal is whether, assuming that the plaintiffs were not justified in pulling down the buildings, the Court below applied the proper measure of damages for the injury in awarding to the defendant only the sum of £15 as damages.

The decision of the first question must, to a great extent, depend upon the construction of the 37th to 39th Municipal Regulations of Port Elizabeth. The Regulations are as follow: "37. Where a building or structure is considered by the Town Council to be ruinous, or so far dilapidated as thereby to have become, and to be, unfit for use or occupation, or is from neglect or otherwise, in a structural condition prejudicial to the property in, or to the inhabitants of the neighbourhood, the Town Council may issue an order requiring the owner, agent, or occupier of such building or structure referred to as a neglected building, to take down or repair, or rebuild the neglected structure, or any part thereof, or to fence in the ground on which it stands, or any part thereof, or otherwise to put the said building or structure, or any part thereof, in a state of repair or good condition, to the satisfaction of the Town Council, within a reasonable time to be fixed by the Town Council. If the order is not obeyed, the Superintendent of Works or other duly authorised officer may, with all convenient speed, enter

upon the neglected structure or such ground as aforesaid, and execute the order. 38. Where the order directs the taking down of a neglected building or structure, or any part thereof, the Town Council may, in the execution of the order direct the removal of the materials to a convenient place. 39. The Council may recover from the owner of such neglected building or structure all costs and expenses in connection therewith in like manner as if the same were a penalty imposed by these regulations." It was under these Regulations that the Council ordered the building to be demolished, and claimed from the defendant the cost incurred in so doing. Due notice was given to the defendant of every step intended to be taken by the Council, and although he protested against such steps being taken, he never applied to the Courts for an interdict restraining the Council from taking action. It is unnecessary for the purpose of the appeal to recite the different proceedings taken by the Council in the matter. It appears that for the greater part of the time during which the disputes were occurring, there was a kind of dual control in Port Elizabeth in respect of the buildings of the town. The plague having broken out, a Plague Board was established, and on the 16th September, 1901, the chairman of that Board gave notice to the defendant's agent prohibiting the use or habitation of the dwelling-houses in question. On the occupiers vacating the premises, the secretary of the Board obtained and kept possession of the keys thereof. On the 5th February, 1902, the Town Council passed a resolution giving the defendant two months to put his premises in a fit state to be inhabited, subject to the approval of the municipal health officer and town engineer. In pursuance of this resolution, the defendant obtained specifications from competent contractors for carrying out the required work. On the 7th of February, 1902, the contractors wrote to the secretary of the Plague Board asking for the keys of the buildings, so as to enable the defendant to comply with the decision of the Municipal Council, but the answer was that it would be necessary for the defendant himself to communicate with the Board. This was a most extraordinary answer to give, but the

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Town Council was not responsible for it. The defendant also demanded the keys from the Council, but, as the keys were not in the possession of the Council, the demand was not complied with. It is clear from the evidence of the secretary of the Plague Board that the Board was determined that the repairs should not be effected to the premises. It is equally clear that the premises were not past repair, and that with the proposed expenditure they might have been placed in a fairly habitable condition. The repairs were not, however, effected, and on the 31st March, 1903, a notice was served by the town clerk on the defendant calling upon him to demolish the structures, and giving him notice that unless they were removed before the 8th April the Council would cause their demolition, and hold him responsible for the costs. He protested against such action, but the work of demolition was proceeded with, and the present suit was instituted to recover the cost thereof. The Court below held that the buildings could not fairly and reasonably be said to have been ruinous or so far dilapidated as to bring them within the meaning of sec. 37 of the Municipal Regulations. In this view I entirely concur. The regulation constitutes a most serious infringement of the rights of property, and should not be extended by one jot or tittle beyond its legitimate scope. The buildings were certainly not ruinous, nor were they in a structural condition prejudicial to the property in or the inhabitants of the neighbourhood. They were somewhat dilapidated, but the dilapidation was of such a nature that with the expenditure of about £300—an amount which the defendant was ready and willing to expend if the Plague Board would give him the keys—the buildings would have been rendered perfectly fit for use and occupation from a sanitary point of view. From the purely structural point of view the buildings were not in any way dangerous either to those inhabiting them or to neighbours or passers-by. They were consequently not, in the words of the section, "ruinous or so far dilapidated as thereby to have become, and to be, unfit for use or occupation." The Town Council therefore was not entitled to recover the costs incurred in the demolition.

The next question is whether the sum of £15 awarded to the defendant is a sufficient compensation for the injury sustained by him. This is clearly not a case in which anything like exemplary or vindictive damages would have been appropriate. The plague had broken out in the town, and the Council owed a duty to the public to leave no stone unturned to check the ravages of the disease. Its duties under the section were quasi-judicial, and full notice was given to the defendant of every step proposed to be taken in the performance of those duties. The defendant, on the other hand, was an exceedingly neglectful landlord, and admittedly allowed other premises of his to fall into such a dilapidated condition as to be past repair, and for the cost of the demolition of these premises the Council obtained judgment in the Court below for the sum of £10. The premises now in question were certainly in a very unsanitary condition, and if the Council erred in considering that this was a sufficient ground for ordering their demolition it acted in perfect good faith, and with a sole view to the interests of the public of Port Elizabeth. If there had been bad faith on the part of the Council or indignity to the person of the defendant or any invasion of his personal rights, the Court would have been justified, according to the decision in *De Villiers* vs. *Van Zyl* (Foord's Rep., 77), to take such circumstances into consideration for the purpose of assessing the compensation payable to the defendant. In the absence, however, of any circumstances of aggravation, the criterion should, in my opinion, be the diminution in the value of the land in consequence of the injury complained of. In the case just cited I am reported to have said : " In an action of trespass without any circumstances of aggravation, the plaintiff is no doubt entitled only to recover for his actual injury in respect of the trespass itself." It is clear also from *Voet's* remarks in the title on the Aquilian law (9, 2, 6) that in assessing the *damnum injuria datum* it is the actual depreciation in the value of the thing injured, and not the sentimental value attached to it by the owner, which should be primarily considered. The English cases which I have consulted are not quite reconcilable with each other, but according to *Mayne on*

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Damages (p. 430), "where the defendant has knocked down the plaintiff's house, built upon his land which is on lease, the proper measure is the amount by which the selling price of the premises would be reduced by the wrongful act." He cites the case of *Hoskyns* vs. *Phillips* (3 Excheq., 182), where PARKE, J., delivering the judgment of the Court of Exchequer, said: "The proper measure is by how much less the premises would sell in consequence of the wrongful act of the defendant." In the present case the defendant claims damages under two heads—namely, loss of past rent, and the value of the buildings destroyed. In regard to the loss of rent the evidence shows that even if the buildings had not been demolished, the defendant could not have had any rent from them, as the Plague Board kept the keys, and refused him permission to enter or repair the premises. As to the diminution in the value of the land by reason of the demolition of the buildings thereon, it was stated by the defendant's witness, Winter, in his evidence, that the ground without the buildings would, in his opinion, carry a better price than with the buildings. The Court below attached great weight to the evidence of this witness, who was a builder and contractor, with twenty-two years' experience. If once it is established as a fact that the demolition of the buildings has not diminished the selling value of the land, it becomes impossible to hold that, independently of every other consideration, the defendant is entitled so substantial damages for such demolition. The Court below, in the exercise of the functions of a jury, has found the fact to be established, and I am not prepared to say that the finding is contrary to the weight of the evidence.

The result is that the appeal, as well as the cross-appeal, must be dismissed, and as it would be impossible to separate the costs of appeal from those of the cross-appeal, each party will be ordered to bear its own costs.

MAASDORP, J., and HOPLEY, J., concurred.

Appeal dismissed accordingly.

[Appellant's Attorneys, WALKER & JACOBSOHN.
Respondents' Attorneys, FINDLAY & TAIT.]

THE VILANDER CONCESSION SYNDICATE *vs.* THE COLONIAL GOVERNMENT.

British Bechuanaland.—Concessions by Native Chief.—Annexation of Territory.—Judgment of Concession Court.

Mining concessions were obtained from an independent Native Chief, whose territory was afterwards annexed to British Bechuanaland. A Concession Court was appointed by Government, who heard and allowed the claim of the concessionaires, but made them subject to all laws and regulations relating to mines and minerals and otherwise in force in the Territory. In an action in a Divisional Court for a declaration of rights on a special case stated, the decision of the Concession Court, not having been appealed against, was recognised as binding both on the concessionaires and on the Government; but absolution from the instance was granted on the prayer to have declared the claim of the concessionaires to all minerals in all grants of land issued by the Government, it appearing that the consideration due under the concession had been paid after annexation to the Chief, and after his death to his executors, and not paid or tendered to the Government; and that the declaration asked for was inconsistent with the laws and regulations in force in the Territory. An appeal from the judgment of the Divisional Court dismissed.

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This was an appeal from the decision of DE VILLIERS, C.J., sitting as Judge of a Divisional Court of the Supreme Court.

Action was brought for a declaration of rights in respect of two concessions granted by David Vilander, or Philander, Chief of the Meir and Kalahari, of which the plaintiffs were now the holders. The necessary facts are set forth in a special case agreed upon between the parties. No evidence was given beyond that contained in the documents annexed.

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The special case, in paragraphs 1 and 2, set forth the parties, and then continued:

3. Before, during, and after the period commencing with the month of November, 1889, and terminating in April, 1890, one Dâvid Vilanders (hereinafter termed the "chief") was the Chief of the Meir and Kalahari (hereinafter termed the "tribe"), a native occupying and lawfully and peaceably possessing a certain extent of territory (hereinafter termed the "territory") in the country or land known as Bechuanaland and the Kalahari.

4. Over the said country a protectorate has been established by Her late Majesty Queen Victoria in Her Imperial Government; and therein, and subject to such protectorate, the territory was an independent protected State, and the said Vilander was the true and rightful chief thereof, duly possessed of and exercising rights of sovereignty in respect of the territory of the tribe, and, clothed as such chief, exercising such sovereign rights with the concurrence of his Raad, with all right and authority and power to grant land and to make concessions in regard to mineral rights, and in respect of the country or territory occupied by him and the people or tribe under him.

5. On or about the 22nd November, 1889, an agreement in writing was duly entered into between one Adolph Heinrich Carstensen, then of Vryburg, in British Bechuanaland, and the chief, whereby, on the conditions and for the consideration set forth in the said agreement, certain mineral concessions and prospecting rights were granted to the said Carstensen. A copy of the said agreement is annexed, marked "A." The said agreement is hereinafter termed "the concession."

6. Thereafter, on or about the 10th April, 1890, the concession being then still of full force and effect, a further agreement in writing was duly entered into between the same parties for the like purposes and under the like conditions and provisions as those obtaining in the concession, but for an increased consideration and in respect of and throughout a more extended area. A copy of the said further agreement is annexed, marked "B," the said further agreement being hereinafter termed "the further concession."

7. On the 21st January, 1890, the said Carstensen for value absolutely sold, ceded, assigned, transferred, conveyed, and set over to a certain syndicate, termed the Vilander Concession Syndicate, or its trustees for the time being, all his right, title, estate, interest, profit, property, claim, or demand whatsoever in and to the concession, and in and to all rights and privileges conferred upon him thereunder, together with any documents of title or otherwise in anywise relating or having reference thereto. The said syndicate is that mentioned in the first paragraph hereof, and the plaintiffs constitute the said syndicate.

8. Thereafter, in or about the month of August, 1890, the said Carstensen for value ceded, assigned, transferred, and set over to the said syndicate all his right, title, estate, interest, profit, property, claim, or demand whatsoever in and to the further concession in and to all rights and privileges granted to him thereunder, and thereafter on the 4th April, 1893, formally ratified such cession and assignment, and thereby again ceded, assigned, transferred, and set over to the syndicate or its trustees for the time being all his right, title, interest, estate, profit, property, claim, or demand in and to the further concession, and in and to all rights and privileges granted to him thereunder. (Copies of the above cessions were annexed to the case, marked " C " and " D " respectively.)

9. By virtue of the above concessions and cessions the syndicate became and was and is now entitled to claim, have, exercise, and enjoy all the right, title, estate, interest, profit, property, privileges, claim, or demand of what kind soever which, or the right to claim to which, was vested in or possessed by the said Carstensen.

10. The sum of £500 agreed to be paid annually by the concessionaire as the consideration for the concession was paid to the chief Vilander up to the 5th May, 1891, being the date of the annexation of his country to British Bechuanaland, and was thereafter from time to time paid to the said Vilander up to the time of his death, and thereafter to his executors, but the Government does not recognise the validity of any payment made after the 5th May, 1891, aforesaid. No amounts under the concessions, and no fees or licence moneys, have been paid either to

the Government of the former Crown Colony of British Bechuanaland since 5th May, 1891, or to the Cape Government since the annexation of the said territory to this Colony in 1895.

11. By Proclamation No. 106, B.B. 1891, Her Majesty's Sovereignty was proclaimed over the territory to the west of British Bechuanaland, known as Bechuanaland and the Kalahari, in which the territory referred to in this case was included, and by Proclamation No. 120 B.B., 1891, provision was made for the law to be administered therein.

12. In terms of Proclamation No. 159, B.B., 1893, a Court styled "The British Bechuanaland Concession Court" was constituted and established, in order to inquire into and decide upon the validity and scope of claims founded upon grants of land or mineral or other concessions in the territory referred to in paragraph 11.

13. Thereafter, on the 1st September, 1893, and subsequent days, the said Court duly sat to enquire into and decide on the claims advanced before it by the trustees for the syndicate in respect of the concession and further concession, and to hear evidence adduced in support thereof or otherwise, the Crown Prosecutor appearing on behalf of the Government of British Bechuanaland.

14. Thereafter, on the 7th December, 1893, the said claim was duly granted and allowed, as will appear from the copy of the judgment annexed and marked "E."

15. Under the provisions of the "British Bechuanaland Annexation Act, 1895," British Bechuanaland became annexed to this Colony, and sec. 30 of the Act maintained the provisions of Proclamation No. 169, B.B., 1893, and preserved the jurisdiction of the British Bechuanaland Concession Court.

16. By sec. 21 of the said Act it was provided that all liabilities of the governor of the annexed territory, at the time of the said annexation, should be deemed to be liabilities of the Governor of this colony.

17. On divers occasions, both before and after the said annexation, grants were issued in respect of land in the territory, prior to the annexation by the Governor of British Bechuanaland, and thereafter by the Governor of this Colony, and therein the right to minerals or precious

stones was reserved to the Government, as will appear on reference to the terms of the "conditions," inserted in the said grants and hereto annexed, marked "G."

18. The syndicate has duly sought to obtain from the Government a recognition of its rights, and has maintained that such reservations are unlawful, but the Government has refused to recognise the rights of the syndicate in respect of the concession or further concession, and maintains that it is entitled to make such reservations for its own benefit.

19. The plaintiffs contend that the concession and further concession are and have been of full force and effect, and binding upon the Government, and that they are entitled to have their rights in, arising out of, and under the said concession and further concession, declared accordingly by this Honourable Court, and to obtain an order declaring that as to all grants already issued with such reservations the Colonial Government is bound to recognise the said reservations as made for and on behalf of the plaintiffs, and directing the Government, as to any further grants of land in the said territory, to include a condition subjecting such grants to the rights of the plaintiffs and their successors and assignees under the aforesaid concessions.

20. The defendant contends that the plaintiffs are not entitled in the premises to the relief claimed.

The parties pray for judgment in accordance with their respective contentions, with costs.

The concession marked "A," and agreement marked "B," are as follows :

A.

AGREEMENT between DAVID VILANDER, Chief of Mier and Kalahari, hereinafter called the "chief" of the one part, and ADOLPH HEINRICH CARSTENSEN, of Vryburg, in British Bechuanaland, hereinafter called the "grantee," of the other part.

1. In consideration of the sum of five shillings per month, payable in advance, the chief, with the consent of his council and people, gives the grantee the right to prospect for minerals and precious stones throughout his territory, provided that prospecting and digging for minerals and precious stones shall not be allowed in any road, or within two hundred yards of any village, kraal, house, or hut, and upon any land under cultivation, or required for purposes of irrigation, without the

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consent of the chief, his heirs, successors, or assignees, in writing first had and obtained.

2. In consideration of the sum of one pound sterling per annum per square mile, payable as rental in advance in British currency on a day to be fixed by the starting of the first gold or other mineral machinery (quartz-crushing machine), and also of a royalty of 2½ per centum per annum, payable annually upon the gross value of all precious stones and minerals, the property of the chief, and found or won by the grantees—the chief, with the like consent, gives the grantee a mining concession to search for and win precious stones, gold, silver, platinum, and other minerals, over and in one or more area or areas not to exceed in the aggregate twenty miles square, or four hundred square miles, to be chosen by the grantee, provided that such mining concession shall not interfere with any road, village, kraal, house, hut, cultivated or irrigated lands, without the written consent of the chief, his heirs, successors, and assignees first had and obtained, and previous payment to persons disturbed or about to be disturbed of compensation, to be assessed by three appraisers, of whom one shall be appointed by the chief, his heirs, successors, or assignees, one by the grantee, and the third shall be chosen by the other two.

3. The chief, with the like consent, further gives the grantee such wood, water, and other easements within the limits of the said mining concession or demise, as may be necessary for the due working thereof; and also, if no road to the land to be comprised in such concession shall exist, suitable for the transport of machinery or heavy freight, the right to make such road, and sink such pits, or make such reservoirs for water along the same, as may be necessary for rendering the land to be comprised in such concession readily accessible.

4. As soon as the grantee shall have selected and marked off such area or areas as aforesaid, and the first machinery shall be started as aforesaid, the grantee shall thenceforth, in consideration of the annual payment of such rent and royalty as aforesaid, be entitled to convert to his own use all precious stones and all minerals whatsoever found within the limits of this concession or demise, provided that the sovereignty in the soil of the said area or areas, and the sovereign right to all precious stones and minerals thereon and throughout his country, shall remain vested in the chief, his heirs, successors, or assignees, and provided further that the grantee shall be bound to obey and faithfully carry out all laws, rules, and regulations which are now or hereafter shall be enacted or made by the chief, his heirs, successors, or assignees in, over, and relating to either the area or areas hereby demised or any part thereof, or the land to be traversed by such road as aforesaid, as long as the same shall not derogate from or interfere with the rights and privileges hereby conceded or granted to the grantee.

5. The grantee shall be allowed to send into the country of the chief such prospectors and labourers, European or otherwise, as he may require, and to import, duty free, all such plant and machinery as he may require for mining purposes, as well as materials of all kinds, provisions, and clothing.

6. The grantee, in consideration of the premises, hereby promises

and agrees :—Firstly, to pay or cause to be paid punctually to the chief, his heirs, successors, or assignees the aforesaid sums of money, both rent and royalty, as and when the same shall become payable. Secondly, to, at all reasonable times, allow access to his books and accounts to any person or persons, duly appointed by the chief, his heirs, successors, or assignees, to examine the same in order to ascertain or verify the amount of the royalty due to the chief, his heirs, successors, or assignees. And, thirdly, to do his best to secure that the workmen to be introduced by him into the territory of the chief shall be of good character, and to do all in his power to discourage the introduction of intoxicating liquors into the area or areas aforesaid, and to give effect thereon to all laws, rules, and regulations of the chief, his heirs, successors, or assignees, not interfering with the rights and privileges hereby conceded or granted, and especially to carry out his or their laws, rules, and regulations against the supply of intoxicating liquors to his people or any other natives in his territory.

7. This concession or demise shall last so long as the aforesaid sums of money, both rent and royalty, shall be punctually paid, and in the event of the grantee failing to pay the same as aforesaid within three months of the due date thereof, or of his giving to the chief, his heirs, successors, or assignees six months' notice in writing at any time of his intention to terminate this concession or demise, then this concession or demise shall come to an end, and the said sum of one pound sterling per square mile per annum and the said royalty shall cease to be payable, and the grantee shall, on payment of all rent and royalties due to date, be at liberty to remove all machinery and plant and the materials of all buildings erected by him on the land of the chief.

In Witness whereof the parties hereto have hereto affixed their signatures, this twenty-second day of November, 1889, in the presence of the subscribing witnesses :

(Signed) DAVID $\frac{\text{syn}}{\text{merk}}$ VILANDER.

B.

Whereas, under the clause numbered II. of a certain deed of agreement made between me, David Vilander, Chief of the Mier and Kalahari, and Adolph Heinrich Carstensen, on the 22nd November, 1889, I did, for the consideration mentioned thereon, grant unto the said Adolph Heinrich Carstensen "a mining concession to search for and win precious stones, gold, silver, platinum, and other minerals over and in one or more area or areas, not to exceed in the aggregate twenty miles square, or four hundred square miles, to be chosen by the grantee," the said Adolph Heinrich Carstensen ; and whereas I have agreed for further consideration to extend the area in the said section mentioned so as to include the whole of my territory, now these presents witness, and it is hereby agreed :—

1. That for and in further consideration of £100 (one hundred pounds sterling) payable annually, together with and in addition to the £400

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(four hundred pounds sterling) on the 1st June, I do hereby extend in favour of the said Adolph Heinrich Carstensen or his assigns the said mining concession to the whole of my territory, the boundaries whereof are as follows:—The Backriver from Frieslaarsputs to Rooikop; from Rooikop along the first Dune to the Molopo River; along the Molopo River to the junction of the Nosop River; along the Nosop River to Ouang; from Ouang to Kaffirpan; from Kaffirpan to Witpan; from Witpan to "Nawa"nup and back to Frieslaarsputs, or whatever other ground may legally belong to me.

2. That all and singular the terms, conditions, stipulations, and provisions of the said agreement of the 22nd November, 1889, shall be read and considered as if herein inserted at length.

And I, the said Adolph Heinrich Carstensen, for myself and assigns, do hereby agree to pay the consideration aforesaid and to abide by, perform, and keep in respect of the said extension of the said concession all the terms, conditions, and stipulations in the said agreement of the 22nd November, 1889, set forth.

In Witness whereof the parties have hereunto set their hands at Reitfontein this Tenth day of April, 1890.

(Signed) DAVID zyn merk VILANDER.
A. CARSTENSEN.

The judgment of the British Bechuanaland Concession Court, dated Vryburg, 7th December, 1893, was as follows:

The British Bechuanaland Concession Court, having fully considered all the claims brought before it, with the exception of that of Mr. Dominicus, which stands over for further evidence, has arrived unanimously at the following conclusions:—

"A."—CLAIMS ALLOWED.

CLAIM No. 6.

A. H. Carstensen, Mineral Rights over the whole of Vilander's Country.

The entire claim as proved granted, subject to all laws and regulations of British Bechuanaland relating to mines and minerals and otherwise in force in the said territory.

The following was the condition inserted by Government in the grants of land:

That the rights of the proprietor shall not extend to any deposits of minerals or precious stones which may at any time be or be discovered on the land hereby granted, and the right of mining for minerals or precious stones is reserved by the Government, under such regulations as were established by law at the date of annexation of British Bechuanaland, and subject to the conditions mentioned in the judgment of the Concession Court, dated 7th December, 1893.

DE VILLIERS, C.J., after stating the facts as given above, and remarking that the judgment of the Concession Court had never been appealed against, and that it remained binding both on the concessionaires as well as upon the Government, in his reasons for his judgment, said :

The simple question to be decided is, whether the plaintiffs are entitled to a declaration and direction in manner and form claimed by them. A preliminary objection was raised by the defendant's counsel, that whatever right the plaintiffs might have under the concession they have forfeited by reason of their not having paid the annual rents to the Government either of the former Crown Colony or of this Colony. This point has not, however, been clearly raised in the case stated for the opinion of the Court, and it is quite possible that, if the point had been raised, the plaintiffs might have had an effectual reply to the defence. I am bound to add that I cannot agree with the plaintiffs' counsel that payments to Vilander's executors were valid payment under the concession. It is true that under the 7th clause of the first agreement the rents were made payable to the chief, "his heirs, successors, or assignees," but it is clear from other parts of the agreement that the executors, administering the private estate of Vilander, cannot be regarded as the "heirs, successors, or assignees" referred to in the agreement. The 4th clause, for instance, provides that "the grantee shall be bound to obey and faithfully carry out all laws, rules, and regulations which are now or hereafter shall be enacted or made by the chief, his heirs, successors, or assignees." It is obvious that the chief did not intend his executors to be included among his heirs, successors, or assignees, who were to enact the laws of his land. As events turned out the legal successor of the chief is the Cape Government. The Government, however, does not rely for its defence upon this clause of the agreement, but upon the judgment of the Concession Court read by the light of those laws and regulations of British Bechuanaland relating to mines and minerals which were in force in the said territory before the establishment of that Court. It would serve no useful purpose to refer in detail to the several proclamations which embody those laws and regulations, and it is sufficient to say that they are wholly inconsistent with the declaration and direction which this Court is now asked to make. There can be no possibility of a doubt as to whether the Concession Court intended by its judgment to subject Carstensen's rights under the concession to all laws and regulations relating to mines and minerals enacted by the competent legislature for British Bechuanaland. If those laws and regulations are somewhat inconsistent with a recognition of the concession I can only say that this Court has no power or jurisdiction to correct any mistake that may have been made by the Concession Court. It is by no means clear, however, that a mistake was made. The Concession Court possessed very wide powers to impose conditions upon the exercise of any grant or concession, and the rights conferred on Carstensen by the agreement

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were exceedingly vague, and were not exclusive of the exercise of similar rights by others. The chief was induced to make the concession, and the concessionaire hoped to make a good thing out of it, but the precise rights of the latter were not very clearly defined. Then, when the Concession Court came to consider his claim, the grant was confirmed subject to a condition which may possibly deprive the grant of all its real value, but the judgment stands unreversed and not even appealed against. It is not, therefore, competent for this Court to make any declaration or give any direction which is inconsistent with that judgment. In this view of the case it becomes unnecessary to consider the further objection raised on behalf of the defendant, that as the obligation to pay the rents was of a purely personal nature, and might not always hereafter be fulfilled by the plaintiffs, their alleged rights to the minerals cannot be registered as a real and perpetual servitude against the land. For the reasons already stated I am clearly of opinion that the defendant's contention is correct "that the plaintiffs are not entitled in the premises to the relief claimed." I wish, however, to make it perfectly clear that in my opinion the decision in support of the defendant's contention should not have the effect of a final judgment in his favour, but should be in the nature of an absolution from the instance. It is quite possible that the plaintiffs may be able hereafter to adduce further evidence in support of their claim, or to devise some other form of claim which it is in the power of the Court to grant. If a fresh action should be brought, the defendant will be able to raise the defence of forfeiture of the plaintiff's rights by reason of non-payment of rent to the Government, but, as the case stands, the absence of any payment, or even tender of payment, to the Government, affords a reason for absolving the defendant from the instance, and not for giving judgment in his favour. The opinion of the Court is that the defendant's contention is correct, but this finding is to have the effect of absolution from the instance, and the plaintiffs will have to pay the costs of this action.

Against this judgment the plaintiffs now appealed.

Searle, K.C. (with him *McGregor*), for the appellants, submitted that as the judgment of the Concession Court recognised the grant by the chief, all the benefits given by the grant should be maintained. The payment to the chief and to his executors was not raised as a bar by the Government. (*Estate of Thomas* vs. *Keir*, 13 C. T. Rep., 526.) The effect of the judgments of the Concession Court was preserved by section 34 of Act No. 41, 1895.

Sir H. Juta (with him *Nightingale*), for the respondents, were not called upon.

BUCHANAN, Acting C.J., in giving judgment, said: This action was brought in the Divisional Court in the form of a special case, which set out the facts agreed upon by the parties and their several contentions. The Divisional Judge held that the facts set forth did not entitle the plaintiffs to the declaration of rights claimed in the premises, and gave judgment of absolution from the instance, leaving it open to the parties to take fresh proceedings and to supply fuller information upon essential matters not disclosed in the special case. This judgment has been appealed against. The action was founded on certain two concessions granted by the native chief Vilander as far back as 1889 and 1890. At that time Vilander's country was not under British control. By the concessions a payment of £500 a year was stipulated for to be paid by the concessionaires to the chief. In 1891 Vilander's country was annexed to British Bechuanaland, and in 1895 British Bechuanaland was annexed to this Colony. The Government of this Colony is now sued, I take it, as the successors of the chief. When the annexation of Vilander's territory to British Bechuanaland took place, and British Bechuanaland was in the position of a Crown Colony, a proclamation was issued by the then executive Government establishing a Concession Court, by which all concessions given by the native chief before the annexation were to be considered and adjudicated upon. Large powers were entrusted to this Court, and the concessions in question were brought before that tribunal. This Concession Court gave judgment allowing plaintiff's claim as having been proved, "subject to all laws and regulations of British Bechuanaland relating to mines and minerals and otherwise, in force in the said territory." In the special case the plaintiff asked the Court to declare that this judgment was binding upon the Government; and that the plaintiffs were entitled to have their rights in, arising out of, and under the concessions declared. The only specific declaration of rights asked for, however, was an order declaring that as to all grants of land already issued by the Government in the said territory, the Government was bound to recognise that the reservation in said grants of mining rights and of precious stones was made for and

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on behalf of the plaintiffs; and, further, to direct that the Government should insert in any future grants of land a condition subjecting such grants to the rights of the plaintiffs. His Lordship the CHIEF JUSTICE, who presided in the Divisional Court, has, in his reasons, conclusively shown that it is impossible, with the information supplied in the special case, to make the declaration asked for in the premises. The learned Judge clearly stated his opinion that the judgment of the Concession Court, never having been appealed against, became binding under the proclamation upon the concessionaires as well as upon the Government. For myself, I fully concur in this view. But when we look at the case stated, we find it is alleged that the £500 per annum reserved under the concessions was, notwithstanding the annexation of his territory, paid to the chief up to the time of his death, and after his death it was paid to his executors. It had never been paid to or tendered to the Government. In the Divisional Court a preliminary objection was taken that this non-payment had worked a forfeiture; but his Lordship pointed out that this question had not been clearly raised in the case stated. But it is a matter which will have to be considered before any declaration of rights can be made. Then, again, it would appear that the judgment of the Concession Court in effect took the place of the concessions, and limited the rights of the parties in the future. This judgment, while granting the claim under the concession, made it subject to all the laws and regulations of British Bechuanaland relating to minerals and otherwise in force in the said territory. No objection was taken to this declaration of the Concession Court. But the plaintiffs wish to go further. They say, assuming the judgment still stands, his Lordship ought to have declared that the meaning of the judgment was that only such laws as were not inconsistent with the concession—such as those relating to good government of the territory and the like—were binding on the plaintiffs. The particulars in which these laws are asked to be declared not binding on the plaintiffs, however, are limited to a reference to the mineral rights in grants of land made or to be made by the Government. His Lordship, without referring in

detail to the several proclamations which embody the laws and regulations of the territory, says they are wholly inconsistent with the declaration the Court was asked to make. His Lordship remarks further that the Concession Court intended by its judgment to subject the rights of the grantees under the concessions to all laws and regulations relating to mines and minerals then in existence, and which had been enacted by the competent legislature of the territory. As absolution from the instance was granted, these remarks may have the force only of *obiter dicta*, but it seems to me that the reasons of his Lordship have not been shaken in argument. I think, therefore, for the reasons stated by his Lordship, this appeal must be dismissed, with costs.

MAASDORP, J., and HOPLEY, J., concurred.

Appeal dismissed accordingly, with costs.

[Appellants' Attorneys, SYFRET, GODLONTON & LOW.
Respondents' Attorneys, REID & NEPHEW.]

FREEMANTLE *vs.* PAMA.

Contract.—Liability of Agent.

The plaintiff, a Transkeian native, with others, handed their waggons and oxen to the defendant, who leased the same in his own name to the military authorities in Natal for use during the late war. The defendant acted as conductor to the waggons. He was paid a monthly sum out of the earnings by the plaintiff, and it was agreed that when the waggons were discharged the liability of the defendant would terminate. Notice was given by the military authorities to the defendant that the waggon would be discharged on a certain date. The plaintiff did not know of the discharge, and did not recover either waggon or oxen. The waggon was afterwards traced as having been sold, but the oxen were altogether lost to the plaintiff. On being sued in the Magistrate's Court, judgment was given in favour of defendant. On appeal

to the Eastern District Court the defendant was held liable for the oxen. An appeal against this latter judgment dismissed.

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This was an appeal from a judgment of the Eastern District Court, varying the decision of the Magistrate's Court of Matatiele, in a suit brought by a native named Maclean Pama against Percy William Freemantle and Frederick Charles Freemantle. The plaintiff sued the defendants :

(1) For the return of a certain waggon and oxen, etc., or payment of the value thereof, £373 16*s.*;

(2) For £200, being damages sustained by plaintiff through illegal detention of the said waggon, etc.; and

(3) For a full and true account of all moneys received by defendants on account of plaintiff for the hire of the said waggon and oxen, and of all monies disbursed by them on behalf of plaintiff, supported by proper vouchers, debate of such account, and payment of such sum of money as shall be found to be due by them to the plaintiff in respect of this account.

The defendants denied their liability, and in regard to the third claim, they filed an account showing a balance of £90 11*s.* 6*d.* as being due to Percy W. Freemantle, for which he claimed judgment.

The Resident Magistrate, after hearing the evidence, considered the account rendered was satisfactory, except so far as one item of £9 was concerned. He gave judgment in convention for the defendants, and in re-convention for £81 11*s.* 6*d.*, and absolution for the instance as to the £9. Each party to pay their own costs.

From this judgment the plaintiff appealed to the Eastern District Court, which allowed the appeal with costs, giving judgment for the plaintiff for the value of sixteen oxen at £16 16*s.* each, with costs, against F. Freemantle, and ordering the judgment for £81 11*s.* 6*d.* in favour of Percy Freemantle to stand.

The defendants now appealed.

The issues depended mainly on the facts proved. The effect of the evidence sufficiently appears from the various reasons given in the several Courts for the decisions arrived at.

The Resident Magistrate of Matatiele, in the course of his judgment, said :

The point in dispute is the terms of the engagement of plaintiff's waggon. Plaintiff's contention is that defendant Frederick Freemantle, for a sum of £4 a month, held himself responsible for the return of the waggon and oxen, that of defendants being that it was made clear at the time that defendant Fred Freemantle's responsibility ceased when the waggons were discharged, and that he was to get £3 a month for attending to the waggon while so engaged, and that the waggon was to be entered on behalf of plaintiff under the military form of contract, copy of which is attached to the record.

The plaintiff's evidence was not reliable in many details, whereas that of the defendants was straightforward and supported by documents, and it being a question of credulity the Court preferred to accept the version given by defendants. The probabilities besides, in the opinion of the Court, are in their favour ; for if they hired the waggons and accepted all responsibility to return waggons and oxen and gear, they would surely have made better terms to provide against the great risk they would be undertaking. Other natives whose waggons had been similarly engaged had sent for their waggons and brought them back ; if it had not been understood they should do so, it is not likely they would have done so without some protest or action against the defendants. The Court, therefore, took it that plaintiff was responsible for his waggon upon discharge. The driver and leader were provided by him, and they should have remained with the waggon after discharge, or acquainted plaintiff of their difficulties to do so as soon as possible, so that he could have looked after his interests, and that defendant Fred Freemantle merely acted as his agent at the front to represent him in so far as the exigencies of war would allow him. Defendant Fred Freemantle states that owing to hostilities it was not expected of him to see to each waggon, and that so long as he kept in touch with headquarters no more was expected of him ; furthermore, the military having full control of the waggons distributed them as they pleased, so that it was quite impossible for defendant Fred Freemantle to keep in touch with each waggon.

According to the leader's evidence eight oxen were taken out of plaintiff's waggon and handed over to Makaula's waggon, and it appears further that five of plaintiff's oxen were returned with Makaula's waggon to the Mt. Frere district. It is not clear why the military did this, but had plaintiff's driver been called as a witness he might have thrown some light upon the matter, as defendant Fred Freemantle states that it was the custom to provide the drivers with certificates of compensation where it was claimable. But in any case defendant Fred Freemantle could not be held responsible on grounds of negligence or carelessness for any loss plaintiff may have sustained in respect of oxen for which the military were bound to pay compensation under their agreement, and defendant would, of course, not be responsible for losses which were not subject to compensation. Had plaintiff's driver and leader, particularly the former, remained with the waggon, as they

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should have done, they might have seen what became of the remaining eight oxen, but they chose to leave their posts, and hence are unable to say what ultimately became of them.

The JUDGE PRESIDENT of the Eastern District Court referred to this part of the case in the following terms :

It seemed clear to me, on the defendant's own evidence, that he cannot escape liability under the circumstances by alleging the vague and meaningless statement that as long as he kept in touch with headquarters that was all that was expected of him. Such is not the position of a paid agent, who, according to our law, as laid down by *Voet* and other writers, is bound to exercise every care in the management of his principal's business or the carrying out of his agency. Even if some allowance must be made for military exigencies, it was certainly not contemplated or understood by the plaintiff, nor, upon his own showing, by the defendant Frederick Freemantle himself, that he was not to incur any responsibility after the waggon had been formally entered with the military. While the plaintiff's waggon and oxen were away in Natal his sixteen oxen, handed over to the defendant Frederick Freemantle, were lost, and at the date of the discharge of the waggon, in November, 1900, these oxen were not attached to the waggon. It may be as well to observe here that besides the loss of his sixteen oxen it also appears that the Imperial Government, in September, 1900, supplied four oxen to waggon No. 977 (the plaintiff's waggon) at £16 16*s.* each (£67 4*s.*), and in November, 1900, five oxen at the same price (£84). These oxen, therefore, were charged to the plaintiff, and not only was he debited with this amount, presumably deducted from the earnings of his waggon, but he has lost these oxen as well. The military authorities may have been quite within their right in acting in this way, for the form of agreement entered into by the defendant Frederick Freemantle with them gives the Imperial Government this power, but the defendant, having made that agreement and entered the waggon with the span of sixteen oxen complete under it as his own property, was the proper person as against the military to so far protect the plaintiff's interests as to see that these nine substituted oxen did not disappear, or, at any rate, to be able to satisfactorily explain their disappearance. It follows that the defendant received £67 4*s.* and £84, that is £151 4*s.*, less hire from the military through Percy Freemantle than he would otherwise have received. It appears that on 17th January, 1901, the amount of £50 8*s.* was credited and allowed the plaintiff for three oxen as compensation, and this amount is credited to plaintiff in the account rendered him by defendants. These three oxen are presumably portion of the nine oxen replaced by the military at the cost of plaintiff in September and November of the previous year, for the waggon was discharged on 23rd November, 1900. The sixteen oxen of the plaintiff which were handed to the defendant Frederick Freemantle with the waggon likewise all disappeared prior to the discharge of the plaintiff's waggon. Five of these oxen are said to have returned to the Transkei in possession of one Makulu, who sold them to one McKenzie.

Now, under the circumstances, it appeared to me that when called upon to explain what had become of these sixteen oxen it was no answer for the defendant, as responsible and paid conductor, to deny his liability altogether, and shield himself behind the vague expression that as long as he remained in touch with headquarters that was all that could be expected of him. My judgment was, therefore, for the plaintiff for the value of the sixteen oxen at £16 16*s.* (the value mentioned under the agreement), with costs. To this extent the Court altered the judgment of the Magistrate, his judgment in reconvention being allowed to stand.

Searle, K.C. (with him *Percy Jones*), for the appellants, discussed the evidence to show non-liability on the part of Freemantle to account for the non-return of the oxen.

McGregor (with him *Douglas Buchanan*), for the respondent, were not called upon.

BUCHANAN, Acting C.J., in giving judgment, said: A native named Maclean Pama sued the defendants in the Magistrate's Court at Matatiele in an action to recover a waggon, sixteen oxen, and gear; and for damages, and an account. The record shows that during the war, about February, 1900, the plaintiff and a number of other natives were approached by the defendant Percy Freemantle with the object of obtaining waggons for the service of the military in Natal. Percy Freemantle secured altogether eleven waggons from different natives. These were taken to Natal by the other defendant, Frederick Freemantle, and were by him contracted or hired in his own name to the Imperial Government, the natives not appearing as interested in the said contracts. In the Magistrate's Court some difference arose, the negotiations between them having been verbal, as to the exact terms of the contract between the natives and the Freemantles. The Magistrate held that the version of it given by the defendants was the more correct. This was not surprising as, in the absence of any writing, the natives would not be accurate as to dates and such details. The Magistrate, in his reasons, says that it was made clear that the contract was that Frederick Freemantle's responsibility should cease when the waggon was discharged; that he was to get £3 a month for each waggon while they were engaged by the military; and

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that the waggon was to be entered by Freemantle on behalf of the plaintiff under the military form of contract. The waggons were used for some months by the military, during which period Percy Freemantle settled with the natives for the hire. After action was brought Percy Freemantle for the first time made out an account against the plaintiff, on which the Magistrate gave judgment for £81 against the plaintiff on the claim in reconvention. The Eastern District Court did not interfere with this part of the Magistrate's decision; and, as there has not been any appeal thereon to this Court, so much of the original judgment must stand. But on the plaintiff's claim in convention for the waggon and oxen the Magistrate gave judgment for the defendants. On this part of the case the Magistrate said that Frederick Freemantle could not be held responsible on grounds of negligence or carelessness for any loss the plaintiff might have sustained in respect of oxen for which the military were bound to pay compensation. This inference, drawn by the Magistrate from the evidence, is what the Eastern District Court did not agree with, and I must say that I think that Court was right. Freemantle was the conductor of the waggons he took from the natives. He hired them to the Imperial Government, and he certainly was responsible to account to the owners of the waggons as long as they were hired by him to the Government. The Magistrate said that when the waggons were discharged Freemantle was no longer liable. At this stage I am not prepared to differ with the Magistrate on this point, but when the discharge of the waggons took place, it was Freemantle's duty to account to the natives for the property entrusted to him, and he did not do so. As a fact, he did not seem to know where the waggons were. After Freemantle returned to the Transkei the plaintiff naturally enquired about his waggon, but he could get no information from Freemantle, and some considerable time—nearly two years—elapsed without any information being given. The plaintiff was thus forced into bringing his action against the defendant. The waggon was left, it appears, at Maritzburg, and it seems now that notification was given to Freemantle by Raw & Co. that the waggon was there. Some two years after this Raw

& Co. offered Freemantle £30 for the waggon, which was not accepted. Afterwards the waggon became very much the worse for exposure, and Raw & Co. sold it, and they still hold the proceeds, amounting to £16, at the disposal of the person who may be found entitled to the same. The finding of the Magistrate that Freemantle was no longer answerable for the waggon has not been interfered with by the Eastern District Court, and here again there has been no appeal. But I think that Court very properly held that at the least it was Freemantle's duty as conductor to account for the whole of the property entrusted to him. It may be said he had accounted for the waggon, but he has not accounted for any of the sixteen oxen. Had he been able to show, to the satisfaction of the Court, that through no fault of his, through no negligence on his part, and through no carelessness these oxen had become absolutely lost to the plaintiff, it is quite possible that the plaintiff would have had no cause of action. But instead of that Freemantle gives no explanation of any kind. He knew nothing at all about the oxen, and took no trouble to trace them. The Eastern District Court accepted the finding of the Magistrate and took the evidence he found to be credible, and, on Frederick Freemantle's own evidence, found that he had not attempted to account for these oxen, and, consequently, as agent for the plaintiff, he was liable for their value. There is no cross-appeal, and thus the only question we have now to decide is whether the Eastern District Court was correct in giving judgment for the plaintiff for these sixteen oxen. Mr. *Searle* has argued the case very fully, and, during the course of his argument, has removed any doubt I had in my mind as to the number of oxen to be accounted for. In my opinion the judgment of the Eastern District Courts must be sustained, and the appeal will therefore be dismissed, with costs.

MAASDORP, J., and HOPLEY, J., concurred.

Appeal dismissed accordingly, with costs.

[Appellants' Attorneys, DOLD & VAN BREDA.
Respondent's Attorneys, SYFRET, GODLONTON & LOW.]

WRIGHT *vs.* ASHTON.

Game.—Trespass.—Damages.

A land surveyor, being on a farm for a lawful purpose, shot several head of game which were running wild, but which the owner of the property was endeavouring to preserve. Held,—*that no action would lie, not for a trespass, but simply for damages sustained through the shooting of wild animals not either in actual or constructive possession of the owner of the land.*

Semble,—*A person lawfully on private property for one purpose may become a trespasser if he takes advantage of his presence to do an unauthorised and improper act.*

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The appellant Wright sued the respondent Ashton in the Court of the Resident Magistrate for Mafeking, upon a summons which set forth that heretofore, to wit, in May, 1904, defendant did, without the consent or authority of plaintiff, and notwithstanding notices to the contrary in the *Mafeking Mail*, a newspaper published daily in Mafeking, pursue, shoot, and kill certain game, to wit, certain three stembok and five guinea-fowl, on the farm "Neverset," in the district of Mafeking, the property of plaintiff, and did convert to his own use the said game, by reason whereof the plaintiff has sustained damage to the extent of £20, which sum, though demanded, the defendant neglects to pay, wherefore the plaintiff prays that he may be adjudged to pay the same with costs of suit.

The defendant pleaded the general issue.

There was little dispute as to the facts. The defendant had gone on to the property with plaintiff's consent to do some surveying, and was living with the plaintiff's manager when he shot the game on the veldt. Part of the game he left with the plaintiff's manager. Plaintiff wrote to defendant complaining of his conduct, and defendant expressed his regret, and offered to settle, but was referred to plaintiff's attorneys, and the case subsequently came

into Court. The Magistrate gave judgment for plaintiff for £3 5*s*., with costs. In his reasons the Magistrate said :

In this case I found defendant did destroy the game alleged in the summons on the property of plaintiff, and after he had given due notice in accordance with sec. 7, Act 36 of 1886, in a locally published paper, prohibiting this being done ; that in addition to the penalties he might have been entitled to, under the section of Act above quoted, had criminal proceedings been taken, he was entitled to be compensated for the value of the game destroyed on his property. I came to this conclusion, otherwise, the penalty in the Act being limited to £5, for first offence, a person might with impunity shoot considerably more than £5 worth of game, and so be indifferent to any action which might be taken against him ; that I assessed the value of the game at 15*s*. per buck, and 4*s*. per guinea-fowl, making in all a total liability of £3 5*s*.

The defendant thereupon appealed to the High Court of Griqualand West, which Court altered the judgment to one for the defendant, with costs.

Lange, Acting J.P., in his reasons for allowing the appeal, said :

The defendant in the original action was admittedly not a trespasser on the plaintiff's farm when he shot the game in question. It appears that he was temporarily residing on the farm with the plaintiff's consent while engaged in surveying the sites of certain graves on behalf of the Government. The action was therefore not founded on trespass, but merely claimed damages for the loss of the game shot by defendant, which consisted of stembok and guinea-fowl, animals undoubtedly *feræ naturæ*, and in which the plaintiff had no ownership in law. This Court, therefore, held that the Magistrate should have dismissed the plaintiff's claim on the authority of *De Villiers* vs. *Van Zyl* (Foord's S.C. Rep., 1880, p. 77), which was quoted in argument before him. For these reasons the appeal was upheld, and the Magistrate's judgment altered to one for the defendant, with costs. It was pointed out by the Court that the plaintiff was not remediless, because, if he had proceeded criminally against the defendant under the Game Law Amendment Act 36 of 1886, as he might have done, he would undoubtedly, under sec. 7, have recovered the whole of the fine imposed by the Magistrate, which would probably have exceeded the value of the game as assessed in this case.

The plaintiff now appealed to this Court.

Sir H. Juta, K.C. (with him *Sutton*), for the appellant, admitted that plaintiff did not claim for the value of the game killed, but damages for shooting and converting it.

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Strictness was not required in pleading in the Magistrate's Court, and this could be construed as a summons for trespass. There was an *actio injuriarum* for hunting game (*Voet*, 41, 1, 4). Damages had been recovered for trespass in fishing on private property (*Breda* vs. *Muller*, 1 Menz., 425). Damages for trespass could be recovered where animals *ferœ naturœ* were taken on private property (*De Villiers* vs. *Van Zyl*, Foord's Rep., 77). Shooting from a public road was no excuse (*Queen* vs. *Pratt*, 4 El. & Bl., 860). Act No. 38, 1886, recognised ownership in game.

Searle, K.C. (with him *Percy Jones*), for the respondent, maintained on the evidence, as well as the pleadings, that this was not an action for damages or trespass.

BUCHANAN, Acting C.J., said: The respondent in this case—a Government land surveyor—was on the land of the appellant in the exercise of his functions as surveyor. While there, and when he was going to do his work, he says he shot certain game. Upon this the appellant brought an action against him. Now, if this action had been founded upon trespass, the arguments learned Counsel have addressed to the Court would be very strongly in favour of our holding that there would be a ground of action for damages for trespass, although the respondent was on the farm lawfully for another purpose. I think that *Sir Henry Juta* is right in arguing that when a man has a right to go on a farm for one purpose, the fact of his being there does not give him the right to do something else which otherwise he would have no right to do. But the fallacy all through this case is that the action is not one of trespass, and the whole of the argument addressed to us to-day is therefore outside the case. The appellant does not complain of any trespass when he sent his letter of demand, and in the summons his case is that the defendant "did pursue, shoot, and kill certain game, the property of the plaintiff, and did convert to his own use the said game." Then the plaintiff, in his evidence before the Magistrate, says: "I consider £20 a fair value for the game shot, because I am trying to preserve the game. I do not actually claim for value of the game

destroyed, but I want an amount paid to prevent my game being killed." He goes on to say: "Respondent was not a trespasser; he was not charged as such; this £20 damages is in no respect for trespassing." In face of that, I do not see how it is possible for the Court to hold that this is an action for trespass. It is an action simply for value of the game shot by the respondent. The Magistrate, in his reasons, stated that the action was one for £20 damages for killing the game, that he found the respondent had destroyed the game, and that plaintiff was entitled to be compensated for the value of the game destroyed on his property. But there is no ownership in game which is running wild. Of course, if the game were reduced into possession by an enclosure or otherwise, it might be different, but when game is running wild, there can be no ownership in it. If the action had been for trespass, the fact that game had been shot which the complainant was preserving, might seriously affect the question of damages, but as the action had been limited to one for taking animals which are wild by nature, there can be no damages in respect of the shooting of them. That is the view taken by the High Court of Griqualand, and I think it is the correct one. The previous decisions of this Court show that there is no property in such game. In the case which has been cited of *De Villiers* vs. *Van Zyl*, a distinction is clearly drawn between the taking of animals *ferœ naturœ*, and an action for trespass by which damage is done to the owner of the property on which such animals are found. Had this been an action for trespass, I think the evidence would have disclosed a good ground of action, but no damage can be held to be suffered by a person by the destruction of property in which, according to our law, he has no legal right. On these grounds the appeal must be dismissed.

MAASDORP, J., concurred.

KOTZÉ, J.P., in concurring, said: A distinction is drawn in our law between the killing of game and going on to the land of another to shoot game. The actual shooting of wild game does not give ground for an action

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for damages; but going without authority on the land of another would be foundation for an action for trespass. It is said by the Magistrate that the penalty under the statute for killing game on protected property is £5 for the first offence. But that is in a criminal prosecution under the Act, which requires certain preliminaries to be gone through. That does not alter the common law by which there is no property in animals *feræ naturæ*. This action was wrongly conceived. It should have been brought for damages for trespass, not for shooting and converting to his own use certain game.

Appeal dismissed accordingly, with costs.

[Appellant's Attorney, GUS TROLLIP.
Respondent's Attorneys, FINDLAY & TAIT.]

MILLS *vs.* BIDLI.

Native Territories.—Ukulobola.—Validity of Contract.—Ownership of Property.—Attachment.

The contract of "ukulobola," or so-called "dowry," known to native custom in the Transkeian territories, is a valid custom recognised by our Courts.

Though by native custom, until the contract of marriage is fulfilled, the ownership of cattle given as lobola remains in the intended husband during the existence of the contractual obligation the father of the intended wife has such an interest in the cattle as to entitle him to retain possession thereof. This right of retention becomes converted in certain eventualities into a right to the dominium. *As, for instance, on the fulfilment of the contract; as also where the contract is broken by the intended husband. If the contract is not fulfilled owing to the default of the other parties thereto, then the intended husband may re-claim the cattle with their progeny.*

As the father of the intended wife has a valid right, during the continuance of the contract, to retain possession

of the lobola cattle, a judgment creditor is not, in the absence of fraud, entitled to have such cattle declared executable merely because the dominium *is still in his debtor.*

Peacock vs. *Ben Rango* (12 C. T. Rep., 545) approved and distinguished.

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This was an appeal from the decision of Mr. Justice Kotzé, J.P. of the Eastern District Court, delivered in the Circuit Court of Butterworth, reversing the judgment of the Resident Magistrate of Idutywa.

The appellant Mills obtained a judgment for debt against a native named Andries Myatasa, in the Magistrate's Court, and thereafter took out a writ of execution. The messenger proceeded to Myatasa's kraal, and found he was absent at Cape Town, and as no goods were pointed out he made a return of *nulla bona*. Thereafter the messenger attached two head of cattle in the possession of respondent, a native named Mfuleni Bidli. Thereupon an interpleader suit was heard by the Magistrate, when, without evidence being heard, the appellant claimed that the cattle were executable, and were the property of Myatasa. The respondent placed on record the statement that the "cattle had been paid to him by Myatasa as dowry eighteen months ago, and that the marriage has not yet been consummated, and that the parties desire a ruling of the Court whether these cattle are executable or not." The only authority cited was the case of *Peacock* vs. *Ben Rango* (12 C. T. Rep., 545).

The Magistrate gave judgment for the appellant Mills, and stated his reasons as follows: "It is admitted by both parties that the cattle in question were paid to Bidli as dowry by Myatasa, but that the marriage has not yet taken place. This being the case, I hold that the cattle are still the property of Myatasa."

The case was then taken to the Butterworth Circuit Court, where the appeal was upheld, with costs. The presiding Judge, in his reasons, said:

The parties by their counsel appeared before me, and it was mutually understood that the argument should proceed on the case as stated in the Court below. Upon the statement of the case as submitted to me

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I had to presume that the parties to the intended marriage were able and willing in due time to carry out and perform the contract. There was nothing to show that such was not their intention, and, in the absence of any evidence to the contrary, the presumption is that the parties intend to carry out and complete their contract or engagement. This material fact distinguishes the case from *Peacock* vs. *Ben Rango* (12 C. T. Rep., 545), upon which the respondent relied in support of the seizure of the cattle under the writ of attachment. Without in the least questioning the propriety of the decision in that case, by which I consider myself bound, I do not think the judgment of the Supreme Court should be extended beyond the circumstances of the case then before it. In *Peacock* vs. *Ben Rango* the respondent had delivered certain cattle as dowry to the father of the intended bride, but she subsequently refused to marry him, and he thereupon claimed back the dowry cattle from her father, who had meanwhile sold some of the cattle to the appellant. The Supreme Court, following the view taken by the Chief Magistrate of the Transkei, laid down that the ownership in the dowry cattle did not pass until the marriage had taken place, and that consequently the respondent was entitled to claim back the cattle. That the respondent was entitled to claim back the cattle because the girl had refused to enter into marriage seems a sound and reasonable custom. While the general rule may be that the property in lobola cattle does not pass until the intended marriage takes place, it does not follow that under all circumstances, where the marriage is not completed, the dowry cattle can be recovered. Thus, in the case of *William Nojiwa* vs. *Samuel Vuba*, decided by the Court of Appeal in the Transkei, on the 4th March, 1903, where the intended bridegroom had broken off the contemplated marriage, and his father, who had paid six head of dowry cattle for him to the father of the girl, claimed back the cattle with the increase amounting to ten head, the Court held that the plaintiff was not, under the circumstances, entitled to recover the cattle, and gave judgment in favour of the defendant, with costs. This case was decided a year after *Peacock* vs. *Ben Rango*, and is duly entered and recorded in the official record book of the Court of Appeal for the Transkei. In the present instance, as already pointed out, there is apparently nothing to prevent the contemplated marriage from taking place. By native law and custom the payment of lobola or dowry cattle is a very important and serious transaction. According to the Report of the South African Native Affairs Commission of 1905, art. 302, "Ukulobola may be taken to be a contract between the father and the intending husband of his daughter, by which the father promises his consent to the marriage of his daughter, and to protect her in case of necessity, either during or after such marriage, and by which in return he obtains from the husband valuable consideration, partly for such consent and partly as a guarantee by the husband of his good conduct towards his daughter and wife. Such a contract does not imply the compulsory marriage of the woman." Such being the view of lobola according to native law and custom, it seems to me that if the parties are willing to enter into the intended marriage, and the present case falls under this description, then the dowry cattle given in pursuance of, and in

consideration for such intended marriage, are not attachable at the instance of a third party who has obtained a judgment against the intended bridegroom or the person who has handed over the dowry cattle to the father of the intended bride. Such a rule seems to me to be a sound and reasonable one, and, I am assured by many an experienced Magistrate in the Transkei, is strictly in accordance with native law and custom. It does not follow then that, because the ownership remains in the giver of dowry cattle until the intended marriage takes place, such cattle are seizable in execution at the instance of a third party. They would not have been so seizable in the case of *William Nojiwa* vs. *Samuel Vuba*, already mentioned by me, and I need but refer to a similar and well-known rule of our own law that a pledge of moveables accompanied by delivery cannot be attached in execution by a judgment creditor of the pledgor, although the property in the moveables remains in the pledgor.

But, be this as it may, it was contended by Mr. *Gane* for the appellant, that as the respondent Mills is a European, and the question is one between him and a native, sec. 23 of Proclamation 110 of 1879 applies, under which the law of the Colony must regulate and determine the dispute between them. Such is also my own view. As the appellant, as father of the future bride, had received delivery of the dowry cattle and held them as consideration for the intended marriage, which could at any time be consummated, and which the parties presumably wished to be completed, I am of opinion that he cannot be disturbed in his possession of the cattle. In other words, that the cattle are not, under the circumstances, liable to attachment at the suit of a third party. My judgment is therefore in favour of the appellant Mfuleni Bidli, with costs.

Sir H. H. Juta, K.C., for the appellant, submitted that it was necessary to ascertain the legal effect of lobola. It was clear from the decisions in *Peacock* vs. *Ben Rango* (19 S. C. Rep., 323) that, until the marriage, the father only held the cattle in trust for the intended husband. It would lead to fraud if a debtor could part with his property under such an uncompleted contract, and thus defy his creditors.

Benjamin, for the respondent, submitted that there was no evidence of any intended fraud. No such issue had been raised. The delivery of the cattle was in the nature of a pledge, as security for the completion of the contract. The learned Judge, in his reasons, made this clear. The case of *William Nojiwa* vs. *Samuel Vuba* showed that the father had acquired a right over the property.

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Sir H. H. Juta, K.C., in reply, contended that the appellant as a European was entitled to have the case decided by the law of the Colony, not by native custom. The contract set up here did not come within any contract known to our law terminology. It was not a contract of pledge. No relationship had been created which would oust a creditor from attaching the property of his debtor.

Cur. adv. vult.

Postea (November 6),—

BUCHANAN, Acting C.J., in giving judgment, said: The issue in this appeal is, whether or not certain cattle which had been paid by one Andries Myatasa to respondent, Mfuleni Bidli, as so-called "dowry" under a contract for a marriage in accordance with native customs, and which cattle are in the possession of respondent (Bidli), are liable to attachment in execution of a writ taken out by appellant (Mills) upon a judgment obtained by him against Andries Myatasa. The Magistrate of Idutywa, in an interpleader suit heard by him, decided in favour of appellant, but on appeal to the Circuit Court at Butterworth the Magistrate's decision was reversed. After many conflicting expressions of opinion the validity of the custom of lobola prevailing among the natives of the Transkei may be taken to have been finally settled by the decision of the full Court in the case of *Ngqobela* vs. *Sibele* (10 Juta, 346), and the agreement to give "dowry" has since been recognised as a lawful contract among natives. The definition of the contract of "ukulobola" cited in the Circuit Court judgment, taken from the report of the South African Native Affairs Commission of 1905, agrees with the finding of the Cape Native Affairs Commission of 1883, and may be accepted as now generally received. The validity of the contract in this case was recognised in both the other Courts, and is not questioned on appeal. It is the incidents or consequences of such a contract which are involved in the present dispute. It may, I think, be taken to have been settled by the numerous decisions which have been given on the subject

of lobola, and by the opinions authoritatively expressed by experts on native law, that where property—usually cattle, as in this case—has been given as dowry, and the marriage has been consummated, the *dominium* in the property passes to the father; but until the marriage has been consummated it remains in the intended husband. After the consummation of the marriage, on the wife's desertion, or for other good cause, the father may in certain cases be compelled to restore the property received by him under the contract. On the other hand, if there is a failure to complete the marriage, due to the fault of the intended husband, he loses his property, and the father is not compellable to restore the dowry paid. The Magistrate decided that the cattle given for dowry in this case were exigible on the ground that as the marriage had not yet taken place the property therein was still in Myatasa. He relied on the decision of this Court in *Peacock* vs. *Ben Rango* (19 S. C. Rep., 323). But as the learned Circuit Judge pointed out, the facts of that case differed very materially from those in the present action. In *Peacock* vs. *Ben Rango*, the contract to marry had been broken through default of the father, or of the intended wife, and a judgment of the Magistrate's Court had already been obtained declaring the contract to be at an end, and the cattle ordered to be restored. De Villiers, C.J., in concurring in the view of the native custom taken by the Court of the Chief Magistrate, said that three very experienced Magistrates had held "that when cattle was paid as dowry on account of a marriage to be contracted, until that marriage had been contracted the ownership did not pass, and that if any died before marriage, the intended husband bore the loss, and if any of them had progeny he was entitled to the increase. That would clearly show that it was not the intention of the intended bridegroom to pass any property at all, but that the father of the bride was merely to hold these cattle in trust for the bridegroom until the marriage took place. Until the marriage took place the father had no interest in the cattle beyond keeping them as security until the marriage took place." Accepting this as a correct statement of native law sufficient to meet the question dealt with in that case, it does not necessarily dispose of

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the case now under appeal. The Magistrate here omitted entirely to consider the position of the parties, where the contract to marry was still existent. It was taken for granted in this case that the parties were able and willing, and intended to complete and carry out their contract. As the case stands, therefore, though the *dominium* in the cattle was still vested in Myatasa, they were in the possession of Bidli under a valid contract, which contract gave Bidli certain rights over the cattle. In the view I take of native law, until there was some default on the part of the other parties to the contract, Myatasa himself could not reclaim the cattle which, under his contract, he had handed over to Bidli. Myatasa was not entitled to break his contract, and then to take advantage of his wrongful act in so doing. If that is so, I fail to see good ground for holding that a creditor could claim greater rights than the owner of the cattle himself possessed. By the writ obtained by appellant the messenger of the Court was directed to make a levy on the property of the debtor. Where such property is in the possession of the debtor there would be no difficulty. But where possession has been parted with under a valid contract to a third person, who has thereby acquired a right over the property, the judgment creditor cannot ignore the rights of such third person. The fact that the *dominium* remains in the debtor is not sufficient to render the property liable to seizure under the writ, at any rate not until the claim of the possessor is first discharged. The illustration of the pledge of moveables, which, in pursuance of the contract of pledge, had been delivered to the pledgor, used by the learned Judge in the Circuit Court, seems to me directly in point. There is no suggestion of fraud in this case, as the payment of the dowry took place eighteen months before the case was heard by the Magistrate. In my opinion the judgment of the Circuit Court was correct, and this appeal therefrom should be dismissed, with costs.

MAASDORP, J., concurred.

HOPLEY, J., said: The facts in this case are that one Myatasa handed over certain cattle to Bidli, the present

respondent, as part of the ikazi, to be paid to him under a contract of ukulobola, in consideration of receiving his daughter in marriage from Bidli at some future time—presumably when he was able to earn and pay the rest of the ikazi or lobola—and about eighteen months after such handing over of these cattle the present appellant, who had obtained a judgment against Myatasa for a debt, caused the cattle to be attached by virtue of a writ of execution issued in connection with such judgment. Bidli thereupon set up his claim that these cattle were not liable to attachment, as they had been handed to him under the said contract, which, as to their portion thereof, he and his daughter were ready and willing to perform. It was admitted that the actual marriage had not yet taken place, but that Myatasa was likewise still intending to carry out his contract.

In an interpleader suit, the Resident Magistrate decided that the cattle were liable to attachment, on the ground that, as the marriage had not taken place, the *dominium* of the animals had not passed from Myatasa. This judgment was reversed by appeal to the Circuit Judge, the learned JUDGE PRESIDENT of the Eastern District Court, against whose decision the present appeal is brought. The matter involved is one of considerable importance, owing to the fact that it is not uncommon for young Kafirs to engage themselves to marry in similar manner. They obtain the promise of the girl and her guardian, and pay as much of the ikazi as they can afford. They then go away to earn enough to pay the balance of what has been agreed upon, and only when they have fully performed their share of the contract, by paying the full number of the cattle, can they claim that the marriage should take place. But upon the first payment the young man obtained an immediate hold upon the girl and her guardian, and the latter reciprocally has something in the nature of a security that the aspirant will fulfil his promise and carry out his contract. Should he fail to do so through his own fault or change of mind, he is punished for his inconsistency by being unable to reclaim any of the property which may have been handed over from the father or guardian, if the latter can reply that he and his daughter,

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or ward, are ready and willing to perform their share of the agreement. This was the decision in the case of *Nojiwa* vs. *Vuba*, cited by the JUDGE PRESIDENT in his judgment. That decision, based on Kafir law and custom, seems to me to be in accordance with our own ideas of law and equity, and it certainly establishes the position that a guardian, to whom instalments of cattle have been given by way of lobola, has a right of retention which may be converted into absolute *dominium* in certain cases. That he has not absolute *dominium* in such animals as soon as they are handed over to him has been clearly laid down in the case of *Peacock* vs. *Ben Rango* (19 S.C. Rep., 323), which case defines his rights as those of a trustee for his prospective son-in-law; but in the same case it is pointed out by His Lordship the CHIEF JUSTICE that the father has an interest in such cattle, which would enable him to hold them as security for the completion of the contract. He is the trustee (with such personal interest) as long as the contractual relations subsist unbroken on either side, and as long as he and the real owner are in the position of prospective father-in-law and future son-in-law. His trusteeship, however, is changed into absolute ownership in his own behalf upon completion of the marriage, or upon refusal on the part of the young man to fulfil his contract. The trusteeship likewise comes to an end, and the absolute unrestricted ownership of the young man revives, should the father or his daughter commit a breach of the contract by refusing to complete the marriage, or in case the latter should be rendered unfit for the position implied by the contract. These are the main incidents of the contract of ukulobola, before the completion of the marriage; and though it may be urged, as indeed it was urged in argument, that to hold that the rights acquired by the prospective father-in-law over such instalments of lobola cattle should prevail over those of a judgment creditor, who seeks to attach them, opens the door to frauds, it may, in reply, be pointed out that to deprive a father of the security by reason of which he has been reserving his daughter for the man with whom he has contracted to do so, would certainly entail hardship; and that as to the perpetration of frauds each case would have to be inquired into on

its own merits, and in case collusion were proved, the fraudulent arrangements would be set aside, just as, in similar circumstances, they would be set aside in the case of dishonest marriage settlements or other contracts among more civilised people. In the present case, the parties concerned seem to have acted in good faith, and I am of opinion that the appeal should be dismissed, with costs.

Appeal dismissed accordingly, with costs.

[Appellant's Attorneys, WALKER & JACOBSOHN.
Respondents' Attorneys, FINDLAY & TAIT.]

THE RHODESIA COLD STORAGE AND TRADING CO., LTD. *vs.* THE LIQUIDATOR BEIRA COLD STORAGE, LTD.

Sale.—Specific Performance.—Shares.—Damages.

The defendants agreed to take over the plaintiff company for the purpose of amalgamating it with other companies of a similar character. Part of the purchase price was to be paid in cash and the remainder in shares in the new company. The cash was paid, but the shares were kept over pending transfer. In an action for specific performance and for the delivery of the shares, the defendant company alleged mis-representation on the part of the vendors, but at the trial failed to establish this defence. Judgment was given for the delivery of the shares, or in the alternative for the payment of damages equal to their face value. A further sum was also awarded as damages suffered by the delay in making delivery, the shares being now unsaleable. On appeal, the latter sum awarded as damages was disallowed, as no specific loss had been proved.

Semble,—*Where specific performance of a contract of sale is decreed, damages immediately arising out of and consequent on the* mora *of the vendors, may be recovered.* [Per BUCHANAN, Acting C.J.]

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This was an appeal from the decision of WATERMEYER, J., in an action tried in the High Court of Southern Rhodesia.

The plaintiff's declaration was as follows :

1. The plaintiff is liquidator of the Beira Cold Storage, ltd., and sues in such capacity, and is the proper person to sue ; the defendants are the Rhodesia Cold Storage and Trading Co., ltd., a company duly registered in England, and carrying on business in this territory.

2. The Beira Cold Storage, ltd., is a company registered in Southern Rhodesia, and carried on business in that territory and elsewhere, and, prior to the agreements and acts hereinafter set out, the company held certain assets, consisting of leaseholds, plant, credits, and other assets in this territory, in addition to landed property and assets situated at Beira and elsewhere.

3. On 10th February, 1903, an agreement was entered into between the Beira Cold Storage, ltd., called the vendor company, and one Sidney William Bartman, on behalf of a company about to be formed, the terms of which are more fully set out in the annexture hereto marked " A," which forms part of this declaration.

4. Subsequently the defendant company was duly incorporated, and on 20th March, 1903, adopted and held themselves bound as the purchaser company by the terms of the said agreement.

5. In order to carry out the terms of the said agreement, on 13th May, 1903, it was decided by the shareholders thereof to wind up the Beira Cold Storage, ltd., voluntarily, and the plaintiff, Emil Albert von Hirschberg, was duly appointed liquidator of the company on the same date.

6. The defendants have paid to the plaintiff the cash consideration of £11,383, mentioned in Clause 4 of the said agreement A.

7. The certificate for 22,768 shares, part consideration of the said agreements, was handed to the Bank of Africa in London, in trust for both companies until transfer of the vendor company's property and assets to the purchasing company.

8. On or about 18th April, 1903, the defendants took

physical possession of all the premises and plant of the vendor company, and took control of and began carrying on the business hitherto carried on by the vendor company. Transfer of the vendor company's assets to the defendants has been completed.

9. Though as above set out the defendants are in full control of the business of the vendor company, the defendants wrongfully and unlawfully refuse to deliver or allow the said bank to deliver the said shares to the plaintiff.

10. By reason of such wrongful non-delivery the vendor company has suffered loss and damage to an amount of £11,384.

11. The costs incidental to the winding-up of the vendor company have been as follows: The sum of £20 10*s*. 4*d*., being the amount paid to Messrs. Budd, Johnson, and Jecks, of London, solicitors; the sum of £18 2*s*. 1*d*., paid by the vendor company to their solicitors at Salisbury; the sum of £10 15*s*. 8*d*., being the further costs of liquidation prior to these proceedings and payable to the vendor company's solicitor at Salisbury; and a further sum of £400 for general expenses incident to such winding-up, or in all the sum of £450 8*s*. 1*d*. In terms of clause 3 of the said agreement annexed and marked A, the defendants have agreed and are bound to pay the said sum to the plaintiffs, but the defendants refuse to pay the same.

12. All things have happened, all times elapsed, and all conditions been fulfilled entitling the plaintiff to sue.

Wherefore the plaintiff claims:

1. Delivery of 11,384 seven per centum fully paid-up preference shares of £1 each, and 11,384, fully paid-up ordinary shares of £1 each in the defendant company, in terms of the said agreement, or payment of £22,768, their value.

2. £11,384 as and for damages sustained.

3. The sum of £450 8*s*. 1*d*. as detailed in paragraph 11 of the declaration, with interest *a tempore moræ*.

4. With costs of suit.

5. And such alternative relief as may seem meet in the premises.

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The following are the material clauses of the agreement with Bartman, referred to in paragraph 3 of the declaration :

3. As a further part of the consideration for the said sale and transfer, the purchasing company shall pay and at all times hereafter keep the vendor company, its liquidatories, and contributories indemnified against all the costs, charges, and expenses of and incidental to the winding-up and dissolution of the vendor company, and of carrying the said transfer into effect.

4. The residue of the consideration for the said sale and transfer shall be the sum of £34,151, which shall be paid and satisfied as follows : As to the sum of £11,383 by the payment thereof to the vendor company in cash, and as to the further sum of £22,768 by the allotment to the vendor company or its nominees or the nominees of Robert George Davis, of 113, Cannon Street, in the City of London, manager in London of the Bank of Africa, ltd., of 11,384 7 per cent. fully paid-up preference shares of £1 each, No. 250,001 to 261,384, both inclusive, and subject to no restriction as to transferability in the capital of the purchasing company, and 11,384 fully paid-up ordinary shares of £1 each, No. 8 to 11,391, both inclusive, and subject to no restriction as to transferability in the capital of the same company.

6. The sale and purchase hereby agreed to be made shall be completed on 20th March, 1903, at the registered office of the purchasing company, when the said residue of consideration in cash and shares shall be paid and satisfied subject to the provisions of this agreement, and the purchasing company shall issue certificates for the said fully paid-up shares in accordance with this agreement, and the vendor company shall, at the expense of the purchasing company, execute and do all such assurances and things as shall reasonably be required by the purchasing company for vesting in it the said premises and possession thereof, and giving to it the full benefit of this agreement.

9. Unless before the 31st March, 1903, the purchasing company shall have become entitled to commence business, and this agreement shall have been adopted by the purchasing company in such manner as to render the same

binding on the same company, the vendor may by notice in writing to the said Sidney William Bartman determine the same.

10. If from any cause whatever other than the wilful default of the vendor company the purchase shall not be completed on the said 20th March, 1903, the purchasing company shall pay interest as from such date at the rate of 5 per cent. per annum on the sum of £34,151 until the purchase shall be completed.

To this declaration the defendants filed the following plea :

1. The defendants admit the allegation in paragraphs 1 to 8 inclusive of the declaration, and deny those in paragraphs 10, 11, and 12 thereof.

2. As to paragraph 9 thereof the defendants say that prior to the issue of the summons in this action they had delivered the said shares in London to one Davis, who was the agent of the said Beira Cold Storage, ltd., to receive the same. Subsequently, after the issue of the said summons, they obtained an order in the High Court of Justice restraining the said company or their agents from parting with the said shares.

Save as aforesaid, the defendants deny the allegations in the said 9th paragraph of the declaration.

3. The defendants say further, that when they entered into the said agreements of the 10th February, 1903, and 20th March, 1903, for the purchase of the business of the said company they did so, relying on the accuracy of the balance-sheet of the said company made up to the 31st March, 1902, which was handed to them prior to the 10th February, 1903, by the said company, as being a true statement of the financial position of the said company, and in order to induce the defendants to purchase the said business, and the defendants were so induced.

4. Subsequent to the dates of the said agreements and the events referred to in paragraphs 5, 6, 7, and 8 of the declaration, the defendants discovered that the said balance-sheet was false and misleading, and the financial position of the said company was not as represented by them, and that the books and accounts of the said company were false and contained serious discrepancies.

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5. The defendants have furnished the plaintiff with an extract from the report of the auditors, whom the defendants employed to examine the said books and accounts of the said company after the defendants discovered that the said balance-sheet was false, giving particulars of such errors and discrepancies.

6. As soon as the defendants became aware of the said mis-representations they commenced an action in London in the High Court of Justice, King's Bench Division, for rescission of the said agreements by reason of the said mis-representation, which action is still pending. A copy of the summons in the said action is annexed hereto marked "C."

Wherefore the defendants pray that the plaintiff's claim may be dismissed with costs.

The plaintiff's replication was as follows:

1. He admits the allegation in paragraph 2 that the said injunction was obtained; he says he was no party to the proceedings, nor has he any knowledge of the circumstances under which the said order was obtained. After service upon him the plaintiff availed himself of the liberty given him in the said injunction, and he has moved the High Court of Justice in England to set the order aside; his application is still pending in that Court.

2. As to paragraphs 3, 4, and 5, he denies that any statement of account or balance-sheet was handed to the defendants by himself or the Beira Cold Storage Co. No statement of account, financial statement, or balance-sheet was ever referred to during the negotiations, or formed any inducement to the defendants to enter into the said contract. Should this Court hold to the contrary, the plaintiff says the said balance-sheet was the ordinary annual business statement drawn up on the date mentioned, and that the same is a true and correct balance-sheet.

3. The plaintiff admits the receipt of the report referred to, but denies that it is correct in any particular.

4. As to paragraph 6, the plaintiff says the action herein set out was only commenced after summons had been served in this action. On the 15th March, 1904, the defendants made application to this Court to

set aside this action on the ground of the pendency of proceedings in the High Court of Justice aforesaid. The application was dismissed with costs against defendants.

On these pleadings issue was joined. At the trial it was discovered that though a power to transfer the landed property had been given by plaintiff to defendants some months previously, the actual transfer had not been registered to the property in the Portuguese territory, and leave was given to plaintiff to amend his declaration to be in accordance with the actual facts. The only amendment, however, noted in the pleadings was the insertion of the words "not yet" before the last two words of the 8th paragraph of the declaration. No amendment was made in the plea.

Considerable evidence was taken on commission. The Beira Cold Storage Co. had originally been formed and was registered in Rhodesia, and from 1899 to 1903 carried on business in Portuguese East Africa and in Southern Rhodesia. The nominal capital of the company was £25,000, of which £22,132 had been subscribed for and shares issued. No dividends had been paid, but at the annual meeting of shareholders for 1902 the report and accounts for the year ending 31st March, 1902, brought up a profit of £3,615. Of this the sum of £3,157 had been brought forward from the previous year. The directors wrote off £1,280 for depreciation, &c., and carried forward the balance. Mr. A. L. Lawley, a contractor carrying on business in London, was a shareholder and director; but he did not appear to have had much to do with the management or was cognisant of the details of the working of the company. In his evidence Major Frank Johnson stated that there was a proposal made in London to amalgamate a number of similar companies carrying on business in South Africa, and this proposal resulted in the formation of the defendant company. It did not appear who suggested the proposal, but the Beira company did not appear to have had anything to do with the suggestion. The original memorandum of the defendant company was signed by seven persons, each for 200 shares, two of whom were Major Johnson and Mr. Lawley. Before any company

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was formed they and others had discussed the project. On one occasion Mr. Lawley produced the balance-sheet and accounts of the Beira company, saying he had received them by last mail, and handed them to Major Frank Johnson, with the remark, "Now you know as much about this company as I do." Mr. Lawley was not examined, and there was nothing in the evidence to show he had been authorized in any way to act for the Beira company. The local directors repudiated any such authority. The negotiations between the Beira company and the projected amalgamated company were mainly carried on by means of cablegrams between the local directors and Mr. Lawley, who several times asked for a power of attorney, but when terms were agreed upon the local directors sent their power to the London manager of the Bank of Africa, who signed the agreement on their behalf. The cash payment of £11,383 was duly made, and afterwards the scrip for the 22,768 shares in the new company was handed over to the bank to hold in trust for the Beira company, to be delivered over when conveyance and transfer of the property sold was made. Owing to the cessation of hostilities and the absence of a demand for produce and other causes, the business of the cold storage companies declined and became of little value. Disputes then arose, which resulted in these proceedings.

In the trial in the Court below the onus was accepted by the defendants. The defence mainly relied upon was the plea of mis-representation, and this was founded on certain alleged errors in the balance-sheet of March, 1902. The defendants did not assert that there had been fraud, but submitted that mis-representation, even though innocent, entitled them to succeed. Counsel for the plaintiff argued that the defendants could succeed only if there was fraud. Not only was there no fraud, but there had been no representations at all made by the Beira company to the defendant company. They acted on their own knowledge, and there had been no mistake. The following authorities were cited: *Redgrave* vs. *Hurd*, L. R., 20 Chy., 1; *Re River Silver Mining Co.*, L. R., 2 Chy., 604; *Derry* vs. *Peak*, L. R., 14 Ap. Cas., 347; *Adams* vs. *Newbigging*, L. R., 13 Ap. Cas., 308; *Smith* vs.

London House Property Corporation, L. R., 28 Chy., 7; *Hart* vs. *Swain*, 7 Chy., 42; *Wallis* vs. *Stubbs*, 15 R. R., 210; *Cadman* vs. *Horner*, 11 R. R., 135; *Clermont* vs. *Tasburgh*, 20 R. R. 243; *Boscom* vs. *Beckett*, L. R., 8 Eq., 100; *Mason* vs. *Armytage*, 9 R. R., 131; *Fane* vs. *Fane*, L. R., 20 Eq., 619; *Fuller* vs. *Wilson*, 11 L. J., n.s. Q. B., 251; *Udell* vs. *Atherton*, 20 L. J., n.s. Exch., 337; *Barwick* vs. *English Joint Stock Bank*, L. R., 2 Exch., 266; *Mackay* vs. *Central Bank of Canada*, L. R., 5 P. C., 394; *Mullins* vs. *Miller*, 52 L. J., n.s., 380; *Walton* vs. *Coppard*, L. R., 1899, 1 Chy., 92; *Wilmot* vs. *Barwick*, L. R., 15 Chy., 96; *Central Venezuela Railway Co.* vs. *Kish*, L. R., 2 H. L., 99; *Trail* vs. *Bearing*, 33 L. J., n.s., Chy., 521; *Charlworth* vs. *Jenning*, L. T. Rep., 439; *Peek* vs. *Gurney*, L. R., 6 H. L., 377; *Kerr on Fraud and Mistake*, 2nd ed., 38.

On the question of damages the evidence was very meagre. There had been a few sales on 'Change for small parcels of shares in the defendant company, but no market had been created. The plaintiff alleged that the shares were now worthless, and that 10*s*. per share was a reasonable amount to claim for the delay in delivery. The defendants contendedt hat no damages had been proved, as it would have been absolutely impossible to have sold the shares. The cases of *Phillip* vs. *Metropolitan and Suburban Railway Co.* (10 Juta, 52) and *Viljoen* vs. *Hillyard* (Transvaal Law Rep., 1903, 312) were cited.

WATERMEYER, J., in his judgment, dismissed the defence founded on proceedings being pending in another Court, as not being established, and as not being seriously relied upon. He pointed out that the real defence was that of mis-representation, founded on the balance-sheet of March, 1902, a copy of which had been handed by Lawley to Johnson; and at considerable length analysed the evidence, showing the absence both of fraud and of mis-representation. His Lordship also found against defendants on the question of Lawley's agency, and also that the balance-sheet had not been drawn up for the purposes of a sale, but merely to show shareholders the assets and liabilities; and came to the conclusion that the balance-sheet as issued, together with the directors'

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report, was, at the time it was issued, a fair *bonâ fide* statement of affairs sufficient for the purpose for which it was brought into existence. His Lordship therefore held that the plaintiff was entitled to judgment on the first prayer of the declaration; and he presumed that as the scrip was in the hands of the bank there would be no difficulty about its delivery. His Lordship then continued: "The second prayer is for damages for delay in delivering these shares. The shares should have been delivered two years ago, and were then of a substantial value. We are told that now they are practically unsaleable. The delay has been wholly the fault of the defendant company. The plaintiff did everything in his power to expedite matters, writing frequently to defendants' agents from the 24th April, 1903, onwards, asking them to complete the transfer and deliver the shares. He was put off on various pretexts, and it was not till the 16th September, 1903, he learnt through the Bank of Africa that defendants were not prepared to carry out the agreement. Even after summons the defendants delayed the matter in every possible way. It is said that it is not usual to order damages as well as specific performance for breach of a contract of sale, but the Supreme Court has held there are exceptions to this rule, and non-delivery of shares is one of these exceptions; in such cases "the mere statement of the breach would be sufficient indication of the nature of the damages sustained and claimed." (*Philip* vs. *Metropolitan and Suburban Ry. Co.*, 10 Juta, 55.) In the present case a judgment merely for the delivery now of these shares without damages for the delay would be a mockery. The amount of the damages is more difficult to arrive at. In similar cases the damage is generally fixed at the difference between the selling price at the time when delivery should have been made and that at the time of action. But that assumes a market and a probability of sale at the price mentioned. Here we know that though a few shares were sold above par shortly after the flotation of the company, it would have been impossible to sell 22,000 at anything like that price. But still some would have been sold at a good price, and the rest would probably have been disposed of at decreasing prices. And the

fault has been that of defendants. They by their failure to carry out their agreement have put it out of the power of plaintiff to show what he might have done with these shares, and they can hardly be heard now to say that he could not have sold them at any price. The plaintiff claims damages at the rate of 10*s.* per share, and though it is, perhaps, a rough estimate, it may be taken as a fair calculation of what might have been realised by the shares, seeing that at the date of breach they were nominally above par; anyhow, it is defendants' fault that the matter was not put to the test. Judgment will therefore be given also in terms of the second prayer." On the third clause, for the costs of liquidating the Beira company, his Lordship awarded the sum of £155 8*s.* 1*d.*

The actual judgment entered for the plaintiff was as follows:

1. Delivery of 11,384 7 per centum fully paid-up preference shares of £1 each, and 11,384 fully paid-up ordinary shares of £1 each in the defendant company, in terms of certain agreement, or payment of the sum of £22,768, their value;
2. £11,384 as and for damages sustained;
3. The sum of £155 8*s.* 1*d.* as costs of liquidation; and
4. Costs of suit, including costs of commission.

Against this judgment the defendants now appealed.

Schreiner, K.C. (with him *Searle, K.C.*), for the appellants, in the first place referred to the present condition of the pleadings as not showing any right of action, as no transfer had yet been passed.

[BUCHANAN, Acting C.J.: This point was not taken in the Court below, and is not the real defence set up.]

But defendants are entitled to take advantage of the record as it stands. However, the fundamental issue in dispute was whether plaintiff was entitled to obtain specific performance and also damages, beyond what might be any *fructus* of the thing sold. There had been no decision in our Courts giving damages where there had been a decree of specific performance. It had, on the contrary, been clearly laid down in *Philip* vs. *Metro-*

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politan and Suburban Railway Co. (10 Juta, 54) that no such damages could be claimed. The Transvaal case of *Silverton Estates Co.* vs. *Bellevue Syndicate* (Trans. S.C. Rep., 162) was clearly distinguishable. In addition to cases cited in the Court below *vide History of Roman Dutch Law*, 22 Cape L.J., 364, and authorities therein mentioned; *Fry on Specific Performance*, sec. 1300; *Hutton* vs. *Black Reef Co.*, 7 Juta, 77; *Van der Byl* vs. *Hanbury*, 2 Juta, 80; *Lippert* vs. *Adler*, 5 Juta, 385; *Voet*, 19, 1, 20; *Mitchell* vs. *Sam. Weel Syndicate*, 15 C.T. Rep., 217; *Kaiser Bros.* vs. *Wesleyan Church*, 12 C. T. Rep., 147; *Dig.*, 19, 21, 1–3; *Grotius*, Inst., 3, 15, 6; *Irving & Co.* vs. *Berg*, Buch. S.C. Rep., 1879, 188; *Cory* vs. *Thames Ironworks*, 8 L. T., 237; *Bain* vs. *Fothergill*, 31 L. T., 387; *Royal Bristol Permanent Building Society* vs. *Bomash*, 57 L. T., 179. The other issue depended on whether or not Lawley was the agent of the Beira company in negotiating the sale of the property. Counsel referred at length to the evidence, and argued that any representation made by Lawley bound the company. The statements in the balance-sheet were contrary to the actual state of facts. If such statements were material, the defendants were entitled to avoid the contract.

Burton (with him *Close*), for the respondents, was heard only on the question of damages. The plaintiff company had suffered directly from the delay of the defendants to complete the contract, and the authority of the *Silverton Estates* case was directly in point, and was not contrary in principle to the decisions of this Court. The question was not that damages could not be claimed, but that the damages claimed should not be too remote. Counsel referred in detail to the authorities cited, and also to *Voet*, 22, 1, 24–28; *Voet*, 45, 1, 9; *Pothier on Obligations*, p. 466; *Grotius*, 3, 15, 6; *Muhlenbruch ad Pan.*, 3, 2, 357; *Pothier on Sale*, p. 46; *Wolff* vs. *Pickering*, 12 S. C. Rep., 429; *Gilchrist* vs. *Stone*, 5 H. C. Rep., 353; *Van Reenen* vs. *Republic Gold Mining Co.*, 2 Kotzé, 236; *Stewart* vs. *Sichel*, 4 Juta, 438; *Leathern* vs. *Bray*, 6 Natal L. Rep., 20. As to the technical point raised to the pleadings, transfer was not a condition of the agree-

ment. There had been a complete handing over of all the assets.

Schreiner, in reply, had nothing to add on the question of the pleadings.

BUCHANAN, Acting C.J., in giving judgment, dealt first with the point raised on the present state of the pleadings, pointing out that the leave to amend had been given in the Court below in general terms, and anything necessary to put the pleadings in order could be effected, especially as the defences relied upon, and on which the decision of the Court was asked by the parties, depended on the other issues. His Lordship next analysed the evidence, and came to the conclusion that the finding in the Court below on the question of Lawley's agency and of the absence of mis-representation could not be interfered with. Even if the Beira company could be bound by anything said by Lawley to Johnson, His Lordship doubted whether any representations made before the company came into existence could be relied on by the subsequently formed defendant company. His Lordship continued: We therefore are not prepared to disturb the judgment of the Court below as far as it directed the delivery of the scrip, and the payment of the costs of liquidation. The contract between the parties having been established, the question of damages remains for consideration. It has been argued that the passages which have been cited from *Voet* were opposed to a decree of specific performance of contracts of sale being granted without an alternative of damages being given; but if the construction could be given to the text, that this learned commentator on the Roman-Dutch Law intended to lay down that the Court could not enforce such a decree, the answer to the contention is to be found in the fact that it has long been settled by the decisions of this Court that in this Colony specific performance of a contract could not only be decreed, but would, if necessary, be enforced. The old case of *Van der Byl* vs. *Hanbury* indicated one method which the Court could adopt, without resorting to *gijzelling*, or imprisonment. It is not, however, clear that *Voet* did

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authoritatively determine that specific performance could not be enforced. I take it rather that he is of opinion that it is preferable to give an alternative in damages, and this view strongly commends itself to me. It should, I think, be resorted to in the generality of cases of sale, though I admit in some instances damages alone would not afford a sufficient compensation. This is certainly not one of these exceptions, and the learned Judge in the Court below very properly, I think, ordered the defendants to deliver the shares or in the alternative to pay a sum of money equal to their face value. But ought there to have been a judgment for further damages in addition ? I do not find myself able to confirm this part of the judgment for several reasons. In the first place, if the defendants accept the above alternative and pay the damages awarded, the plaintiff will not have suffered any loss whatever, for his very case is that the shares are now of little value. If the defendants instead deliver the shares, then also it is difficult on the evidence to say that any loss has been proved to have been sustained. The scrip was delivered to the bank in good time, and it is common cause it was to be retained by the bank as stake-holder until transfer of the landed property was effected. That transfer has not yet been completed, owing very possibly to the delay of defendants, but even without any such delay it seems probable that the transfer could not have been got through before about September, and since that date it has not been shown that the shares could have been realised at all. It is doubtful if at any time the shares could have been sold, and what dealings there were in the defendant company's shares were for small quantities and at depreciated rates. Moreover, it must not be forgotten that no special damages have been pleaded. Under these circumstances there is nothing upon which to base the judgment for the additional damages. It has been broadly argued that where specific performance is decreed there can be no damages awarded beyond any *fructus* derived from the property itself, and a passage from the judgment of DE VILLIERS, C.J., in *Philip* vs. *Metropolitan and Suburban Railway Co.*, has been greatly relied on, to the effect that, as a general rule, a purchaser suing for specific performance in

a contract of sale is not entitled in addition thereto to claim damages in respect of the profits, which he would have made if the thing or land sold had been delivered or transferred in due time ; but it must not be overlooked that the learned and eminent CHIEF JUSTICE immediately added that there might be exceptions to the general rule ; and in that very case, in addition to an order for the transfer of the property sold, the Court gave damages for an amount equal to the interest on the purchase price, which had been lost to the plaintiff owing to the delay in carrying out the contract. Where a person recovers the identical property he has bought, considerations are involved different from those applicable to a case where damages are given alternatively upon a complete failure to comply with the contract entered into. His Lordship cited *Voet*, 19, 1, 20, in support of his view of the law, and it has been argued that quite a contrary construction on the passage of *Voet* has been given by the Transvaal Supreme Court in the *Silverton Estates Co.* case. But there is no necessary conflict between the two cases if the different state of the facts is looked at. I do not think that fault can be found with the statement of law contained in the head-note to the *Silverton Estates Co.* case, viz. : " Where a seller has made default in the delivery of the thing sold, and is in *mora*, the purchaser, in addition to demanding specific performance, may, where he has sustained damages which the law recognises and allows, claim those damages in the same action." I fully endorse the additional statement that " the nature of the damages so claimed should, however, be specially stated in the pleadings." Of course, as was remarked in the case of *Philip* vs. *Metropolitan and Suburban Railway Co.*, there may be cases in which the mere statement of the breach would be a sufficient indication of the damages sustained and claimed. The cases cited show it is rather a question of the remoteness or otherwise of the damages claimed. Thus in the *Silverton Estates Co.* case the Transvaal Supreme Court awarded as damages the amount of law costs which the plaintiffs had been compelled to pay through the *mora* of the defendants in giving transfer of the property sold. In *Philip's* case this Court gave as damages the amount of

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interest on the purchase price lost by the plaintiffs. In the case of *Kaiser Brothers* vs. *Wesleyan Church*, where the liability of the vendors was admitted by a tender being made, in addition to the transfer of the house sold being ordered, the Court awarded as damages a sum based on the rental of the property between the time of sale and the delivery of possession, but held that the plaintiffs' claim for prospective damages suffered by the loss of possession preventing building operations and in consequence a greater return from the property, was too remote. In this case, had there been any allegation that interest or dividends had accrued on the shares before their delivery, the Court would probably have given damages to cover any such amount. But I need not discuss the legal aspect of the question further, as we are of opinion the evidence does not support the second claim for damages. The appeal will therefore be allowed with costs, and the judgment in the Court below amended by striking out the second paragraph, but otherwise it will be confirmed, with costs in the Court below.

MAASDORP, J., in concurring, said: I do not think, under the circumstances disclosed in this case, that there is any necessity for re-opening any of the points decided in the decisions which have been cited. No damages have been proved to have been actually suffered, and therefore no sum can be awarded under that head. Nothing now said can be taken to over-rule any of the previous cases.

HOPLEY, J., also concurred, and agreed that no damages had been proved.

Appeal allowed accordingly, with costs.

[Appellants' Attorney, GUS TROLLIP.
Respondent's Attorneys, SYFRET, GODLONTON, & LOW.]

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VOL. II.] [PART V.

CASES

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OF THE

CAPE OF GOOD HOPE,

WITH TABLE OF CASES AND ALPHABETICAL INDEX.

JANUARY TO AUGUST, 1906.

BY

DOUGLAS M. BUCHANAN, M.A.,

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VOL. II.—PART V. AND INDEX.

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JUDGES OF THE SUPREME COURT

ASSIGNED TO THE

COURT OF APPEAL.

Sir J. H. de Villiers, P.C., K.C.M.G., Chief Justice.

Sir E. J. Buchanan, Justice.

C. G. Maasdorp, Justice.

W. H. Hopley, Justice.

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PART V.

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LUBBE *vs.* THE COLONIAL GOVERNMENT.

Locatio operarum—*Salary—Dismissal—Estoppel.*

Plaintiff was employed by the Government as a scab inspector on an agreement terminable on one month's notice given or received. While so employed, during the recent war and rebellion, plaintiff was deported by the military under martial law, and did not perform any duties. Some months before the deportation, Government informed plaintiff and other scab inspectors that payment of their salaries would be stopped for the present. Plaintiff wrote asking to be paid for the full month within which notice had been given, signing his name as "late inspector;" but this was not done. The Government neither dismissed plaintiff nor required him to perform his duties, and, as a fact, were ignorant of his deportation. Some months afterwards plaintiff was called upon to resume his work, when he informed the Government that he had recently lost his leg in a railway accident, but that he would be prepared to resume work in two months, whereupon he was summarily dismissed. He thereupon sued for his salary to date. The Government tendered salary up to the date of plaintiff's deportation, and relied on that

deportation as a defence to the rest of the claim. Plaintiff, in replication, said he was in no way to blame, and that he had always been ready and willing to perform his duties.

At the trial in the Divisional Court, judgment was given for the Government, the presiding Judge holding that the plaintiff was estopped by his acquiescence in the notice stopping his emoluments. Held, on appeal, *that the defence of estoppel was not raised on the pleadings, and was inconsistent therewith, and had such a defence been pleaded plaintiff might have been able to set up a sufficient answer. The tender was held insufficient, and judgment was given for the salary due up to the date when plaintiff became incapacitated for duty.*

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This was an appeal from the judgment of a Divisional Court of the Supreme Court, in an action instituted by the appellant to recover the sum of £207 15*s.* 7*d.*, as salary due to plaintiff by the Government as a scab inspector for the Wards 1, 2, and 6 in the division of Clanwilliam.

The declaration set forth that the plaintiff had been appointed to his office on 10th February, 1900, at a salary of £200 a year, the engagement being terminable on one month's notice; that the plaintiff performed his duties until 30th September, 1902, having previously, on 25th August, 1902, received notice terminating the agreement; that the plaintiff had been paid his salary up to 16th September, 1901, and that the amount claimed was the balance due between that date and the date of the termination of the contract.

The plea denied that plaintiff had performed any duty since 17th September, 1901, and specially averred that on 31st January, 1902, the plaintiff was deported and removed from Clanwilliam to Matjesfontein, in the Worcester district, by the Imperial military authorities, and there detained until 4th July; that the plaintiff remained away and did not return to the Clanwilliam district prior to 25th August, 1902; and that by reason of such absence the plaintiff was totally unable to perform

any of the duties of his office, and, in consequence, the notice of discharge of that date was given to plaintiff. The plea went on to state that the plaintiff had been paid his salary up to 16th September, 1901, and that on 3rd February, 1905, the defendant tendered payment of further salary to 31st January, 1902, which tender was now repeated, with costs to date of tender.

In his replication, the plaintiff said he was in no way to blame for his deportation under martial law, and that he held himself ready to proceed with his work at any time when the restrictions imposed under martial law were removed. Plaintiff denied that the notice of discharge had been given him in consequence of any inability to perform his duties, but was given because of his alleged incapacity by reason of a severe accident occurring after his release from detention.

At the trial several witnesses were examined, but the case turned mainly on the construction to be put on the correspondence which passed between the parties, as will appear from the subjoined reasons of the presiding Judge. Judgment was given for the plaintiff for the amount tendered, with costs to date of tender, plaintiff to pay the costs after that date. Against this judgment the plaintiff now appealed.

HOPLEY, J., in his reasons for the judgment appealed against, said :

The plaintiff, a farmer, resident in the district of Clanwilliam, has since the year 1895 been one of the Government scab inspectors for certain wards in that district, and his most recent appointment to that position was dated Feb. 10, 1900, when he was appointed inspector for wards 1, 2, and 6 in the said district, at a salary of £200 per annum, the engagement being terminable at a month's notice. This was during the continuance of the war, but at a time when it was not expected that the district of Clanwilliam would be directly involved in the struggle. An invasion of this Colony by the enemy, and a rebellion of some of its subjects took place shortly after, and the district in question, as well as many others, came into the area of hostilities, so that a military commandant was appointed there, and eventually in January, 1901, martial law was proclaimed. The plaintiff, at that time residing in the town of Clanwilliam, was allowed to go into the district only when it suited the military situation, and then only upon his procuring a pass to go forth. In this respect he was in no wise differently treated from any other of Her late Majesty's civilian subjects, and no blame

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is imputed to him, therefore, but the inevitable result was that he could only intermittently and at best inadequately discharge the duties of his office, which, of course, had to be performed among the flocks throughout the wards of the district for which he was responsible. Seeing that they were getting in many quarters of the country no services for the salaries they were paying to the scab inspectors, the government officials in charge of this branch of administrative government, with the consent of the responsible minister, issued a circular to all inspectors who were thus impeded by the military situation, informing them that their emoluments would be temporarily stopped. The plaintiff was one of those who received this circular, which was in the following terms :—

" Department of Agriculture,
" Cape of Good Hope,
" Cape Town, 3rd October, 1901.

" SUSPENSION OF DUTIES.

" SIR,—I am directed to inform you that the government have decided that where sheep inspectors are unable to carry out their duties owing to the disturbed state of the country, payment of their emoluments shall be temporarily stopped. In accordance with this decision the Secretary for Agriculture has given instructions to temporarily cease payment of your salary and allowance.

" When you are again authorised by this department or by the chief inspector of sheep to assume duty, your emoluments will be paid as heretofore.

" I have the honour to be,
" Your obedient servant,

" CHARLES CURREY,
" Under Secretary for Agriculture."

It will be seen that this is not a dismissal from office, or a notice to terminate the engagement, but merely an intimation that pay will be suspended until the department should deem it expedient to allow the inspector to resume his duties. In the case of the plaintiff this was followed by a letter from the chief inspector of sheep, addressed to him, informing him once more of the determination of the government, and telling him that his pay had been stopped from September 1st, 1901. This letter was dated October 9th, 1901, and it concludes : " When again authorised by this office to assume duty, your emoluments will be paid as heretofore." Now, when the plaintiff received the circular and this letter, it seems to me that he was bound to elect a course. It is clear that he need not have acquiesced, in which case he should have protested, and then the government would have been able to dismiss him with his pay to date and a month's pay in lieu of notice. In that case, however, it would be unlikely that he would be reinstated when the time of unrest should be over. His other course was to acquiesce, and thus retain his post and the goodwill of the department under which he had to work. The correspondence

which ensued clearly shows that the plaintiff chose the latter alternative. All he says in his letters is in effect that he worked for sixteen days in September before he received any notice to discontinue, and that he should be paid for that month ; and, eventually, when government did pay him for the sixteen days in September, his only grievance was that he should have been paid for the whole of that month. In his letter of 11th January, 1902, in which he sets forth this grievance (without claiming anything for October, November and December) he signs himself: " F. J. LUBBE, late Sheep Inspector, Wards 1, 2 and 6, Clanwilliam." By adopting this attitude he created a feeling of security in the department with which he was concerned, and led them to think that the proposal they had made had been fully accepted by him, and he is estopped from now saying that he never had such intention, but that he was at all times holding himself in readiness to do his duties. There is a further phase in this case which, however, I do not consider as being of much importance after the acceptance of the government proposal by the plaintiff: I refer to the fact that during January, 1902, the plaintiff was by the military authorities, in the exercise of their arbitrary powers under martial law, deported from his district to another district as an " undesirable." The reason for this has never been explained, and the plaintiff, though he applied to those in authority—to the resident magistrate of Clanwilliam, who was deputy-administrator of martial law, and to the military commandant of his district—has never been able to elicit any reason for the step taken against him. The result, however, was, that he was not even in his own district and was consequently wholly disabled from the performance of any portion of his duties. This, as I have said, does not in the circumstances seem to me to make any important difference. Had he been allowed to remain in Clanwilliam, it is clear that even if the military authorities had been willing to allow him to go about the district he would not have done so after his acceptance of the circular and letter which enjoined on him inactivity until he received definite instructions from the head office to resume duty. I do not agree with Mr. Currey in thinking that the mere fact of the deportation was sufficient to render the plaintiff liable to dismissal for misconduct. In the unfortunate circumstances in which the country was then placed it was possible for innocent and harmless men to incur suspicion and to be deported from their districts ; and as to that ground alone I think that before a public servant could be legally dismissed, an inquiry should establish that he had merited such treatment. That has never been proved in the plaintiff's case. The further history of this case is that on 4th July, 1902, he was freed from military surveillance and detention and granted a free railway pass to go home, which he immediately proceeded to do, but most unfortunately he met with an accident on the journey which caused him to lose a leg, and to be laid up for some time in hospital at Touws River. At the end of July the agricultural department, who were apparently quite ignorant of his deportation and subsequent misfortune, telegraphed to Clanwilliam to the Civil Commissioner to get the plaintiff to resume his duties as scab inspector. This was for-

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warded to him in hospital, whence he telegraphed that he would not be able to resume duty until October, but would be glad to be excused till January. It was then that, on inquiry, the department discovered the deportation and the circumstances and nature of the accident, and thereupon, on 25th August, 1902, the plaintiff was dismissed by a letter which alleged his incapacity, owing to his accident, to perform his duties as the reason for the termination of his appointment. The plaintiff made no move in the matter after this letter until September, 1904, when as he states the decision in the case of *Van der Merwe* vs. *Colonial Government* (21 S. C., 520) gave him grounds for the opinion that he too might succeed in a similar action. The difference between the two cases, however, is that Van der Merwe never received the letter suspending him from duty and temporarily stopping his pay. He consequently could not be held to have acquiesced in the arrangement made by the government; but, as I have already shown the plaintiff in the present case received the notifications and elected to fall in with the proposed arrangement. His present claim, however, is for payment from 17th September, 1901, to 30th September, 1902, based on the ground that he was the scab inspector during all that time, and consequently entitled to pay for the full period. He certainly had never been dismissed from his post, but he was holding his position after October, 1901, on the understanding that he was to receive no pay until he resumed duty, and as he never did resume duty, it seems to me that his action must fail. In the pleadings the defendants tender £75, with costs, to the date when they first made such tender—viz. 3rd February, 1905. This tender is really for pay from September 17th, 1901, until 31st January, 1902, when the plaintiff was deported. In my opinion the defendants need not have made this tender, but as they have done so, they must be held bound by it, and judgment will accordingly be for the plaintiff for the amount tendered, with costs, to the date of tender, the plaintiff to pay costs after that date.

Burton (with him *Douglas Buchanan*), for the plaintiff and appellant, submitted that the judgment in the Court below was founded on a defence which the Government had not set up. No estoppel had been relied upon; and estoppel, if relied upon, must be pleaded. The plea admitted the contract, and relied on plaintiff's deportation as being the breach. Counsel admitted that if the deportation had been due to the plaintiff's default, he would not be entitled to succeed, but there was no proof of any misconduct. The Government did not dismiss plaintiff when he was deported, but kept him on as an inspector, and subsequently gave him notice to resume work. The tender admitted liability.

Searle, K.C. (with him *Morgan Evans*), said it was

necessary to consider the terms of the contract between the parties. The term of hiring was subject to one month's notice on either side. Notice of suspension was given, and thereafter plaintiff did nothing until after *Van der Merwe's* case (21 S. C. R., 520).

[DE VILLIERS, C.J.: That case differs from this, in that there was no deportation.]

Here the tender was to save litigation, not an admission of liability. After the notice of suspension, plaintiff never resumed work, and the evidence showed he did not intend to claim salary until he resumed. Estoppel need not always be pleaded. (*Everest & Strode* on Estoppel, p. 402; *Freeman* vs. *Cooke*, 2 Exch., 662; *Levy* vs. *Tildesley*, 1 Juta, 228; *Claridge* vs. *Kellaway*, 8 Juta, 140; *Grobbelaar* vs. *Colonial Government*, 15 C. T. R., 591.)

DE VILLIERS, C.J., said: The action was brought by the plaintiff to recover his salary as scab inspector from 17th September, 1901, up to 30th September, 1902. The plaintiff alleges that he has performed his part of the agreement, and that the agreement remained in force until September, 1902. The plea to the declaration is, that on 31st July, 1902, the plaintiff was deported and removed from Clanwilliam to Matjesfontein, and that, by reason of the deportation and the absence of the plaintiff, he was totally unable to perform his duties; and, further, the defendant tenders on and to 31st January, 1902, to pay the salary up to that date. The replication is, that the deportation was entirely beyond the control of the plaintiff or the defendant, and that the plaintiff held himself ready to proceed with his work at any time when the restrictions were removed, and, therefore, his deportation is no defence at all. That is the simple question raised by the pleadings. In the course of the evidence, however, some evidence was given, upon which the defendant relied, as showing that after the contract had been entered into, there was such conduct on the part of the plaintiff as amounted to a waiver or acquiescence by him in the determination of the Government not to pay him salary. That question is not raised by the pleadings at all, and if it had been

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raised, it is quite possible the plaintiff might have had a good answer to it. It is a matter that raises an entirely new defence. Now the learned Judge found upon this letter that the plaintiff acquiesced by the answer which he wrote, and that if he had not so acquiesced, the Government would have given the plaintiff notice, as the Government had a right to do. But, when I refer to the evidence given by Mr. Currey, it is by no means clear that the Government would have dismissed the plaintiff if he had not acquiesced. Mr. Currey's evidence clearly shows that if the plaintiff had not been deported it would have paid him for the intervening time, in the same way as it paid Van Weilligh, to whom a notice of temporary suspension had also been given. Now, the letter written by the Government was an answer to the letter written by the plaintiff. He wrote on 9th September, 1901: "Enclosed I send you my monthly report for August. It is very small, but I can't help it. I could not get a pass out to-day to fetch some other horses or mules, and perhaps after that I will be able to go out a little again"—showing all through a readiness to do his work. Then come to the letter of 9th October, 1901. There the Chief Inspector writes: "With reference to your letter dated 9th ult., advising me that, owing to the disturbed state of the country, you were unable to properly perform your duties as sheep inspector, I have the honour to advise you that, in view of this, the Government has decided to temporarily stop payment of your emoluments, and that the Civil Commissioner of your district has been instructed to cease paying you from 1st September, 1901. When again authorised by this office to assume duty, your emoluments will be paid as heretofore." Then comes the plaintiff's further letter of 11th January, 1902, upon which the learned Judge strongly relied. In that letter he asks for payment for the whole of September, and he signs himself "The Late Sheep Inspector." I can quite understand the learned Judge and the argument of the learned Counsel for the respondents that the original contract had been temporarily suspended after the plaintiff had acquiesced in such suspension. But, not only is there no plea to that effect, but there is a statement by Mr. Currey that the salary is withheld for

a wholly different reason. Moreover, there is this pregnant fact that the Government in its plea tendered payment until 31st January, 1901, the date of the deportation, and thereby recognised that notwithstanding the letter of the previous year, and the alleged acquiescence of the plaintiff in that letter, they were ready to pay to 31st January, the date of the deportation. Under the circumstances, it seems to me not just to the plaintiff that the notice of 9th October, 1901, should be made the ground of defence. It is quite possible, and not improbable, that the plaintiff might have had a very good answer to such a defence. Now, that being so, the only question which remains is, whether the decision in *Van der Merwe* vs. *Colonial Government* (21 S. C., 520), the correctness of which is not impugned on behalf of the respondent, is applicable to the present case. The effect of that decision I take to be, that, bearing in mind the special nature of the duties of a sheep inspector, he does not lose the right to his full salary if, during the period of his employment, he is ready and willing to perform his duties, but is prevented, not by personal unfitness, but by external circumstances over which he has no control, from actually performing his duties, whilst the Government, on the other hand, neither dismisses him nor insists upon his performing the duties. The only substantial difference between that case and the present is that Van der Merwe had not been deported, but, although he had not been deported, it was just as impossible for him to perform his duties as it was for the present plaintiff after his deportation. Even if the plaintiff had remained in the district of Clanwilliam, he would have been prevented by the state of affairs under martial law from performing any of his duties. His colleague, Van Weilligh, was not deported, but could not get a pass from the military authorities to enable him to do his work, and yet he was paid his salary. It has not been suggested from the bar that the plaintiff had been guilty of conduct which justified his removal, and certainly no evidence to that effect was tendered. Mr. Currey, the Under-Secretary for Agriculture, in his evidence, assumed that the plaintiff merited his deportation, and relied upon this as a ground for summary

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dismissal, but this assumption is warranted neither by the evidence in the present case nor by the circumstances known to this Court under which the military authorities under martial law deported other loyal and law-abiding subjects. Until the unfortunate accident which deprived the plaintiff of the use of his leg, he was personally quite fit for the performance of his duties, and was ready and willing to perform them, and the Government, knowing that he was prevented by external circumstances from performing his duties, neither dismissed him nor requested him to do any work. If he had been dismissed he might have sought some other occupation, instead of holding himself in readiness for work as soon as the removal of martial law should permit of his resuming his duties. In July, 1902, the Government asked him whether he could resume his duties, and, if so, when. His answer was that, owing to his accident, he could not resume before 1st October, and he asked to be excused until 1st January. Thereupon, on 25th August, 1902, he received a notice of summary dismissal. His counsel now does not press for the payment of any salary after he had become incapacitated for work. The result is, that the appeal must be allowed, and judgment entered for the plaintiff for £174 8*s.* 11*d.*, with costs in this Court and the Court below.

BUCHANAN, J.: I concur in allowing this appeal, on the ground that the judgment was based on an issue not raised on the pleadings. The defence relied on by the Government in their case was upset by the evidence given by Mr. Currey, their executive officer. The reason given for the judgment was also inconsistent with the tender pleaded. I am not prepared to say that there were not good grounds for holding that the plaintiff had acquiesced, only this was not the defence taken by the Government, and there has been no amendment of the pleadings so as to allow this defence to be relied upon.

MAASDORP, J., also concurred.

Appeal allowed accordingly, with costs; and judgment entered for plaintiff for £174 8*s.* 11*d.*, with costs.

[Appellant's Attorneys, VAN ZYL & BUISSINNÉ.
Respondent's Attorneys, REID & NEPHEW.]

HEYDENRYCK *vs.* MACKIE, YOUNG & CO.'S TRUSTEE AND THE STANDARD BANK.

Insolvency—Preference—Covering Bond for Future Advances—Cession—Priority of Secured Debts.

C. agreed to support M. & Co. in business on their executing the usual general covering mortgage bond to secure present and future advances. Such bond was duly passed and registered. For the purpose of financing the business, C. from time to time discounted the promissory notes received in ordinary course of trade from M. & Co. with the Bank, and to secure the Bank ceded to it the covering bond. Upon the insolvency of M. & Co., the Bank proved on their estate for all the acceptances of M. & Co. held by it. The trustee, in his liquidation account, awarded to the Bank a preference in respect of the whole claim proved. Held, *that it was no valid ground of objection to the award on the part of the appellant (in whose favour C. had subsequently passed several general bonds), that the debts proved by the Bank had been incurred after the date of the cession to it of the covering bond.*

But held, further, *that, inasmuch as the security under a covering bond commences not at the date of the registration, but at the date when the debt is incurred, the Bank was not entitled to preference as against the second bondholder in respect of any of the debts incurred by M. & Co. to C., after the date on which the debts were incurred by M. & Co., to the appellant and secured by the subsequently registered bonds.*

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Heydenryck *vs.* Mackie, Young & Co.'s Trustee and the Standard Bank.

This was an appeal from the decision of a Divisional Court of the Cape Supreme Court, on an application made by appellant to amend the liquidation and distribution account, framed by the trustee of the insolvent estate of Mackie, Young & Co., by striking out a preference awarded to the Standard Bank on their proof of debt for £6,208 5*s.* 2*d.*, under a general mortgage bond, leaving it as a concurrent claim; and to award a

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preference to the claim of appellant proved under certain other general mortgage bonds.

The bond in question was a notarial bond, duly registered in the Debt Registry, dated 23rd April, 1901, acknowledging the partners in the firm of Mackie, Young & Co. to be indebted in the sum of £5,000 sterling to Messrs. Cresswell, Sons & Co., and binding generally all the debtors' property acquired and to be acquired; and annexing an agreement setting forth the terms and conditions on which the mortgagees had agreed to grant an open credit and certain other business facilities to the mortgagors, and specially upon the condition and stipulation that the debtors should give the mortgagees the security contained in the bond. The condition of the bond was as follows:

> Now, therefore, the condition of this bond or obligation is such that if the appearers shall well and truly pay or cause to be paid at due dates to the said mortgagee, his attorney, executors, or assigns, all sum and sums of money which now, or at any time hereafter shall be or become due, owing, and payable by them to him, whether arising from promissory notes, drafts, acceptances, goods sold and delivered interest, discount, or charges, stamps, commissions, moneys paid to or for account of the appearers, or from what cause soever, and shall well and faithfully perform and fulfil all the conditions and stipulations agreed upon between them and the mortgagee, then these presents shall be null and void, but otherwise they shall be and remain in full force and effect.

Affidavits were filed on both sides, for and against the motion. The material facts and arguments of Counsel are sufficiently set forth in the reasons for judgment given below. The following authorities were cited: 3 *Burge*, p. 215; *Dig.*, 20, 4, 16; *Van Zyl's Judicial Practice*, p. 570; *Leibbrandt & Geyer* vs. *Dickson & Burnies*, 2 Menz., 335; *Trustees W. P. Bank* vs. *Horah's Trustees*, 5 Searle, 122; *Maasdorp's Institutes*, Vol. 2, p. 222; *London and South African Bank* vs. *Trustees of Gates*, 5 Searle, 244.

The presiding Judge in the Divisional Court, BUCHANAN, Acting C.J., in giving judgment dismissing the application, said:

> The second-named respondent, the Standard Bank, claimed as preferent creditors on the Insolvent Estate of Messrs. Mackie, Young

& Co., in respect of certain acceptances secured by a notarial general bond, duly registered on 23rd April, 1901. This claim was admitted by the Master, and the first-named respondent, the trustee of the estate, has now filed his liquidation distribution account, in which he has awarded the Bank preference on the proceeds of the property not subject to any special hypothecation. The applicant, who holds several bonds registered subsequently to respondents' bond, has applied to have the distribution account amended so as to award to him under the general clause in his bonds the preference which the trustee has awarded to the Bank. To understand the relative position of the parties, it is necessary to consider the facts disclosed on the affidavits. From these it appears that early in the year 1901, Messrs. Cresswell, Sons & Co., a London firm, agreed with Messrs. Mackie, Young & Co., who carried on business in Cape Town, to open a supporting account upon Mackie, Young & Co., passing in their favour the general bond in question, covering present and future transactions. The validity of this bond is not questioned. Under this security Cresswell & Co. supplied goods from time to time, for the price of which Mackie, Young & Co. gave acceptances. Later on, Cresswell & Co. discounted some of these drafts with the Standard Bank, ceding to them the covering bond in question. The date of cession was 12th December, 1902, and is in terms absolute. But it is clear from the affidavits and the subsequent dealings of the parties that the bond was held by the Bank as security for the paper discounted, and that Cresswell & Co. were entitled to the return of the bond when their liability to the Bank on the acceptances discounted were discharged. This especially appears from the fact that subsequently, when negotiations took place between Cresswell & Co. and Gardiner & Co. to take over Mackie, Young & Co.'s account, Cresswell & Co. directed the Bank to hold the bond at disposal of Gardiner & Co. on their discharging Mackie, Young & Co.'s liabilities on their drafts in favour of Cresswell & Co. These negotiations fell through, and the bond was retained by the Bank. When Mackie, Young & Co.'s estate was sequestrated in 1904, their acceptances then current were all of date subsequent to 12th December, 1902, the date of the cession to the Bank. These acceptances were at the time under discount with the Bank, who had recurrence thereon against Cresswell & Co. Holding these acceptances as well as the bond, the Bank proved them on the estate, claiming the preference now in question. The applicant does not object to the proof of the Bank, his case being that it should rank as a concurrent and not a preferent claim. Applicant's Counsel freely admitted that had Cresswell & Co. never ceded the bond, but had retained possession of it, and had themselves proved for the outstanding acceptances, they would have been entitled to the preference, but he contended that in the hands of the Bank the bond only secured preference for such bills as were in the Bank at the date of cession. This contention, if I understand Counsel's argument correctly, was founded on the proposition that the Bank, not being an original party to the bond, could not tack on to the debt due to Cresswell & Co. at the time of the cession, and thus transferred to the Bank, a debt subsequently incurred to the Bank itself. The doctrine of tacking of

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claims is certainly not recognised by our law, and the applicant's contention might have had some force if the Bank had claimed a preference for debts incurred by the insolvents directly to the Bank subsequently to the cession. But there were no transactions between Mackie, Young & Co. and the Bank. On the cession of the bond to the Bank, Cresswell & Co. did not close their account with Mackie, Young & Co., but continued the course of business agreed upon when the bond was passed. These very transactions were what the bond was given to secure, and they are represented by the acceptances in question, and it is common cause that had Cresswell & Co. retained the bond in their possession they could have claimed a preference for them. In the case of *London and South African Bank* vs. *Trustees of Gates* (5 Searle, 246), it was argued by Counsel for the successful party that where promissory notes in the hands of third persons were secured by a registered bond, the holders of the bond could be compelled to prove for such liabilities, and to hold the amount recovered as trustee for the creditor holding the notes. It does not appear from the report whether or not the Court adopted this view, but it is not necessary to go so far in this case, as the Bank holds both the acceptances and the bond which was given with the object of securing them. For the financing of their business, Cresswell, Sons & Co. discounted with the Bank the acceptances they received from Mackie, Young & Co., and handed the bond to the Bank as a security for the accommodation given them by the Bank just as they might have handed over any other securities they might have had in their possession. I fail to see how the fact that some of these acceptances were discounted by Cresswell & Co. at the time of the cession, and others were discounted subsequently, could relieve Mackie, Young & Co. from their obligations under the bond. The cession of the bond to the Bank did not give them a discharge of their debts. As the bond covered the subsequent transactions, and was valid as against Mackie, Young & Co., I see no ground for holding that their insolvent estate can be placed in a better position than they themselves were in. The very object of the bond was to secure a preference in the event of insolvency. The registration of the bond was notice to the applicant that he was dealing with persons who had secured their supporters in business for past debts as well as for future advances, which security would give the supporters a preference should insolvency intervene; and with this notice before him the applicant became a creditor, and now insolvency has intervened. Under these circumstances, in my opinion this application must be refused, with costs.

Against this decision the applicant now appealed.

Burton (with him *J. E. R. de Villiers*), for the appellant, contended that when the bond was ceded the cessionary could only give the right of security for debts which were in existence at the time. The Bank, as cessionaries, could not claim preference on debts afterwards incurred.

The cession had been an out-and-out cession. The Bank had no *locus standi* with regard to debts afterwards incurred between the insolvents and the cedent. Counsel relied on the authorities cited in the Court below.

Searle (with him *Close*), for the respondents, pointed out that the debts proved by the Bank were contemplated and secured by the bond. This was not a case of tacking a debt not within the four corners of the contract. In addition to the authorities cited, see also Ordinance No. 27, 1846, preamble and sects. 3 and 4; *Hare* vs. *Heath's Trustee*, 3 Juta, 32; *Maasdorp's Institutes*, p. 271; *Trautman* vs. *Imperial Fire Insurance Co.*, 12 S. C. Rep., p. 38; *Pothier ad Pan.*, 20, 4, 1, 2; *Netherlands Bank* vs. *Liquidators Samuel Frank & Co.*, Trans. S. C. Rep., 1904, p. 554.

Burton, in reply, cited *Voet*, 20, 1, 18.

Cur. adv. vult.

Postea (February 24),—

The COURT intimated that Counsel should be heard on a point of law not previously discussed, viz., the date at which preference was to run for debts secured by a covering bond.

Burton (with him *J. E. R. de Villiers*), for the appellant, said he understood the Court to desire argument on a point of law which at the previous hearing he had admitted, without having given his attention specially to it, to be against him,—viz., whether or not bonds passed after a general covering bond had been duly executed and registered, took preference over debts secured by the covering bond but incurred after the date of the subsequent bonds. He admitted that the practice in this Colony seemed to have been to give preference for all advances made under the first bond.

[DE VILLIERS, C.J.: Has there been any judicial pronouncement on the point?]

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Apparently not. The old case of *In re Carter—Leibbrandt & Geyer* vs. *Dickson & Burnies* (2 Menz. 335), was between the preferent and concurrent creditors, and does not settle the point. The practice in the Deeds Registry Office seems, to some extent, to recognise all advances made under the first covering bond as being preferent to subsequent general bonds. *Van Zyl's Judicial Practice* (1st ed., p. 569), implies an opposite view, citing *Holl. Consult.* (vol. 1, No. 29, at p. 419), which holds that the priority arose only at the time when the money was actually advanced. (*Et Holl. Consult.*, Vol 4, No. 134, at p. 228.) Against this is the opinion expressed in *Maasdorp's Institutes* (vol. 2, p. 272), founded on *Voet* (20, 4, 30); but the latter portion of the passage cited seems to have escaped the attention of the learned commentator. The law of Holland laid down by the *Consultatien*, and approved by *Voet*, is clearly opposed to the practice prevailing in this Colony, which has been to some extent admitted, and which affirms the general principle on which, at the previous hearing, Counsel had argued that a general bond had no validity, apart from a principal debt, and that a cessionary could only claim for the debts that had been incurred prior to the cession.

Searle, K.C. (with him *Close*), for the respondents, submitted that the point now raised had never before been taken, and involved much more important and far-reaching results than the objection taken in the notice of motion. The principle of covering bonds and general clauses in conventional and notarial bonds had been recognised both by practice and by legislation for sixty years. Before this practice should be altered an opportunity ought to be given to put the facts before the Court. It would appear from the *Discount Bank* vs. *Dawes* (1 Menz. p. 385), heard in 1829, that by the civil law and the former law of Holland notarial general bonds secured a preference even without registration, though this was altered by the placaat which required the payment of the duty. Then came the Ordinance No. 28, of 1846, sect. 4, which enactment is relied upon in *Maasdorp's Institutes*, as supporting the view of the

law there expressed. Probably that Ordinance was the result of *In re Carter*, and though not having *ex post facto* effect, made all future bonds preferent for the amount named. Reference to the latter portion of *Voet* (20, 4, 30), would support the preference where a definite sum had been settled between the parties.

[DE VILLIERS, C.J.: That is simply making the law laid down by the Dutch jurisconsults the same as that adopted by the Ordinance.]

But surely we are entitled to the benefit of the remark made by *Voet*. The practice in this Colony for the last sixty years had been in accordance with this view of the law, and was necessary in the interest of trade in dealing with the supporting commercial houses. The point does not seem even to have been previously raised in any case, but the Court has always hitherto accepted the established practice.

[MAASDORP, J.: If the opposite principle is now adopted, general bonds would be useless.]

That is our contention.

[DE VILLIERS, C.J.: The practice of houses taking general bonds is to stipulate that the mortgagor shall, without their consent, pass no further bonds.]

The whole practice of the country will be altered, and practically the system of general bonds will be swept away. It would be desirable to call evidence on the point before it was judicially dealt with, especially seeing that the point was never raised by the applicant in his objection to the liquidation account. A covering bond has always been regarded as fixing a maximum amount, which, should a *concursus creditorum* take place, is accepted as preferent. Notice has been given of this amount by the registration of the bond in the Deeds Registry.

[DE VILLIERS, C.J.: To my mind, the law as stated by *Voet* is so just and logical that no practice contrary to it ought to be allowed.]

But the result of *Voet's* remarks are in our favour. The old Ordinance of 1846 recognised this, and the practice shows it has always been so understood. Counsel also referred to *Hare* vs. *Trustee of Heath*, 3 Juta, 32; *S.A. Loan, Mortgage, and Mercantile Agency* vs. *Cape of*

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Good Hope Bank, 6 Juta, 163; *Brink, N. O.*, vs. *High Sheriff*, 12 S. C. Rep., 414; 3 *Burge*, 216-7; Act No. 19, 1891, sect. 9; Rules of Registry of Deeds Office, part 3, sect. 1; *In re Russouw*, 1 Menz., 479.

Burton, in reply, said the argument of his learned friend went to the length of asking the Court to declare that the law had been abrogated by disuse.

DE VILLIERS, C.J.: At the date of the insolvency of Mackie, Young & Co., the respondent Bank was the holder of a general bond passed by the insolvents in favour of Cresswell, Sons & Co., on 23rd April, 1901, and by them ceded to the Bank on 12th December, 1902. The bond was for £5,000, but it was really a covering bond for past and future advances, and the amount was fixed, not as showing the actual indebtedness at the time of the passing of the bond, but in order to fix the amount, in compliance with section 4, of Ordinance 28, of 1846, beyond which future advances should not be deemed to be covered. The cession to the Bank purported to be an absolute one, but it is clear from the dealings between the parties that it was the ordinary case of a bank discounting the bills of its customer, and receiving, as collateral security, a bond passed in favour of such customer by his debtor. The Bank, therefore, if it recovered from the debtor more than the amount due to it by such customer, would be bound to account for the difference to the customer. The Bank proved on the insolvent estate for the sum of £8,000, and stated in the affidavit of proof that it held as security for the debt certain covering bonds, including the bond now in question. Annexed to the proof was a statement showing that the amount of the debt was made up of promissory notes endorsed first by the insolvents, and then by Cresswell, Sons, & Co., for whom they had been discounted by the Bank. The first of these notes was dated 20th July, 1903, and the last on 15th December, 1904. The trustee, in his distribution account, awarded a preference to the Bank, under the bond, in respect of the unpledged movable assets of the insolvent, over general bonds passed by the insolvent after the registration of the bond

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now in question. The applicant, who had proved on the estate under the general clause of certain bonds passed in his favour by the insolvents, objected to the award. The bonds in his favour were bonds for £500, £600, £500, and £600 passed and registered on 17th May, 1902, 7th January, 1903, 8th May, 1903, and 11th June, 1904, respectively, mortgaging certain immovable property, but containing the general clause. These bonds were also covering bonds for past and future advances. The debts covered by the bonds and proved in the insolvent estate by the applicant were made up mainly of promissory notes made by the insolvents in his favour. The date of the first of these notes was 1st August, 1902, and the last 15th June, 1904. The ground of the objection was that, although the applicant's bond was of a later date than the Bank's bond, the latter could not claim a preference inasmuch as the liabilities thereby secured had been incurred subsequent to the cession of the bond to the Bank. An application to a Divisional Court for an amendment of the account having been refused, the present appeal has been brought before a full Court.

I must say at the outset that I fully agree with the learned Judge in the Court below that the Bank was entitled to the same preference as the firm of Cresswell, Sons & Co. would have had upon the insolvent estate if they had not parted with the bond. The contract between that firm and the insolvents was that all debts which should thereafter be incurred by the latter to the former should be secured by the continuing bond, and the contract between the Bank and the firm was that whatever rights should from time to time accrue to the firm under the bond should enure to the benefit of the Bank in security for its claim against the firm. The firm, if it had retained the bond, would have been entitled to any preference thereby conferred in respect of debts incurred at any time after the registration of the bond, and, by ceding the bond to the Bank as a security, it ceded to the Bank the right to such preference even in respect of debts incurred after the date of the cession. In support of the contrary view, reliance has been placed upon the following passage in 3 *Burge's Commentaries*,

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p. 218: "A third mortgagee succeeding to the place of the first mortgagee, or an assignee of the first mortgagee, would not obtain a preference over the second mortgagee for any debt except that of the first mortgagee. He could not, therefore, tack his third to the prior mortgage." The passage, however, cited by *Burge* from the *Digest* (20, 4, 12, sect. 4), shews that he was contemplating a very different state of facts from the present, and it certainly does not support the inference drawn from it on behalf of the appellant. Under the law of England, if a third incumbrancer by mortgage, without notice of a second incumbrance at the time of lending his money, purchases the first legal mortgage, equity will tack both incumbrances in his favour; so that, as the report in the old case of *March* vs. *Lee* (2 Ventr., 387) has it, "the third mortgagee shall thereby squeeze out and gain priority over the second mortgagee." The passage cited by *Burge* makes it clear that under the Roman law the cessionary of a first mortgage could acquire no greater rights as against the second mortgagee than those enjoyed by the first mortgagee, but it makes it equally clear that the cessionary by stepping into the shoes of the first mortgagee would enjoy the same rights as the latter would otherwise have enjoyed. I am unable, therefore, to agree that the mere fact of the debts proved by the Bank having been incurred after the date of the cession of the bond, deprives the Bank of the preference to which the firm which ceded the bond would have been entitled.

The important question, however, arises whether the firm itself would have had a preference under its general covering bond in respect of debts of a later date than debts due by the insolvents to the applicant, and secured by the general clause of the bonds in his favour. This question was not raised in the Court below, nor was it raised during the first argument on appeal, although it clearly appeared from the respondent trustee's letter of 13th January, 1905, that preference had been awarded to the Bank on the ground that "by virtue of the general clause, the bond of the Standard Bank, as being prior in date and registration, is entitled to a preference." The distribution account also, to which the applicant objected,

shewed that this was the basis upon which the account had been framed. This Court, finding it impossible to approve of an account which assumed that the preference of a covering bond begins to operate at the date of its registration, and not at the date when the debt is actually incurred, directed the attention of the parties to the difficulty and requested a re-argument upon the point. During the re-argument, the applicant's Counsel did not abandon the objections which he had previously urged, but he candidly admitted that the difficulty raised by the Court had escaped his observation, and he was allowed to argue in support of an amendment of the account on a somewhat different ground from that which had been stated in the notice of motion. There were no facts in dispute, and if there existed a legal objection to the manner in which the account had been framed, that objection appeared in the face of the proceedings. The result of the re-argument has been to confirm the Court in the view that the account objected to has been framed upon an erroneous principle. The contention of the Bank is that the firm of Cresswell, Sons & Co. would have been entitled, but for the cession, to preference in respect of debts incurred to them by the insolvents subsequent to the date of debts secured by the applicant's bond. These debts, it is said, relate back to the respective dates of the registration of the bonds, and their relative priority must be regulated by the dates of the bonds. I cannot, however, find any authority for such relating back, but, on the contrary, the opinion expressed in 1 Dutch Consult., 291, is an express authority to the contrary. It is there laid down that where a bond is passed to secure future advances there is no mortgage until the debt is actually incurred, and the jurisconsult (*S. van Beaumont*) adds that, so far from the creation of the debt being drawn back to the date of the bond, it should rather be held that the constitution of the bond is deferred to the date of the incurring of the debt, on the principle that an accessory obligation follows the principal, and not the reverse. A similar doctrine is even more emphatically laid down by three eminent Dutch lawyers (*Van Amstelredam, Van Kink*, and *De Quesnoy*) in a Consultation reported in

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4 Dutch Consult., 134, and their opinion is mentioned with approval by *Voet* (Comm. 20, 4 30). The only authority cited in favour of the contrary view is a passage in Chief Justice MAASDORP'S excellent *Institutes of Cape Law* (b. 2, ch. 33), to the effect that "a bond in security of future advances dates not from the day when the advances were actually made, but from the date of the registration of the bond." If by this passage was meant that the date of registration of such a covering bond fixes the date when, in competition with other preferent creditors, the preference operates upon debts subsequently incurred by the mortgagor to the mortgagee, this view would be in direct conflict with the passage from *Voet's* Commentaries cited by the learned author himself. In that passage, *Voet* discusses the application of the rule *qui prior est tempore potior est jure* to the case of a mortgage constituted for a debt which is suspended by a condition, and he does say that where a condition, the fulfilment of which is not dependent on the will of the debtor, is attached to a mortgage, the date of the constitution of the mortgage, and not of the fulfilment of the condition, is the period when the preference takes effect. In such and similar cases he holds that when once the condition comes into existence the bond will have the same effect as if no condition had been attached. He adds, however, that if the obligation to which the condition is attached be of such a nature that it cannot come into existence against the will of the debtor, it must, on the contrary, be held that he must have the preference in whose favour a later mortgage was passed for an unconditional debt before the condition of the first obligation took effect. After giving some illustrations of this rule, *Voet* proceeds thus: "It is upon this ground also that the Dutch jurists advised that where a house had been mortgaged *coram lege loci* by an innkeeper for such ale or wine of uncertain quantity as might in future be sold and delivered to him by a brewer or a wine merchant, the mortgage and preference did not take effect until the date of the sale and delivery of the wine and beer. Although, according to more recent ordinances of Holland, such a mortgage for an uncertain debt still to be incurred would not bind immovable property

unless the amount to be brought within the obligation were fixed, and the fortieth part of the amount," being the Government tax for the registration of the bond, "paid." The inference drawn by the respondent's Counsel from this last sentence, that the Legislature had altered the rule previously laid down by *Voet*, is not justified by anything said by him. The sentence begins with the word "quanquam," which I have translated into the word "although," and not, "but," as translated by *Berwick*. The requirement that the amount beyond which the preference shall not operate should be fixed in the bond, can have no bearing upon the question, whether such preference shall take effect before the debt is actually incurred. It is admitted that if debts of less amount than the stipulated sum are incurred the preference would only affect the sum total of the debts thus incurred, although duty had been paid in respect of the full stipulated sum. In the same way, there is no inconsistency whatever in holding that the preference arises as the debts are incurred, and ceases as the debts are discharged. In the absence of any appropriation by the debtor or by the creditor at the time of payment, if the debts are of the same nature, so that the debtor has no more interest in the payment of one than of the other, the appropriation must, under our law, be made to the older debts. In a current account, therefore, between a banker or merchant, and his customer, the older items on the debit side of the account are discharged or reduced by the older items on the credit side. As fresh debts are incurred the covering bond held by the banker or merchant would secure such debts, but in competition with other creditors holding a like security, even though of later date, the dates when the fresh debts were incurred are the dates when the preference began to operate. It is said that a different practice has been followed by many trustees in the distribution of insolvent estates, but no reputed case can be found in which any South African Court has recognized the legality of the practice. But then it is contended that, as there is no decision of any South African Court in support of the Dutch law, this Court should now hold that the Dutch law has been abrogated by disuse on the principles stated in *Seaville*

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vs. *Colley* (9 Juta, 39). In that case, it was laid down that the presumption is, that every law in force in this Colony at the time of the British occupation in 1806, and not since repealed by local statute, is still in force. It was there further laid down that the presumption will not prevail in regard to any rule of law as to which the Court is satisfied that it is inconsistent with well-established and reasonable custom; and that, although it relates to matters of frequent occurrence, it has not been distinctly recognized by any unoverruled decision of the Supreme Court. Even if the practice of fixing the date of the registration of covering bonds as the period when preference operates upon all debts thereafter incurred had been well-established, I should certainly not consider it a reasonable custom. The more reasonable practice appears to me to be to take the dates when the debts were actually incurred as the respective dates when the debts obtained a preference. A person holding a general covering bond is not bound to continue making further advances, or giving fresh credit, when he finds that the debtor has passed fresh covering bonds. The means of knowledge he fully enjoys, for the Legislature has expressly provided that, in order to give notice to all persons dealing with such a debtor, the bond shall be registered in the Deeds Office within seven days after execution (see *inter alia* Ord. 27 of 1846, preamble). The Deeds Office is open to the inspection of the public —and as a fact, periodical lists are circulated among the mercantile community of bonds from time to time passed. Nothing would be easier for bankers and others taking covering bonds as security, than to stipulate that, if a fresh bond is passed, the existing debt will become immediately payable, and no further advances will be made. The hardship, therefore, arising from the application of the Dutch rule of law is not so great as has been represented. As to the inconvenience of applying the Dutch rule, the utmost that can be said is that it might sometimes necessitate intricate accounts in the administration of insolvent estates, but the difficulty is not too great for a competent accountant to surmount. There is, as I have said, no decision of our Courts that is inconsistent with the Dutch law, and the only question is

whether section 4 of Ordinance 28 of 1846 in any way modified the law. That Ordinance required that a covering bond should state that the same is intended to cover and secure future advances, and should express the sum beyond which such future advances should not be deemed to be covered, but it in no way recognized the existence of any debt as a preferent claim until the debt was actually incurred. The proviso to section 4 provides that nothing therein contained should be construed so as to give validity or effect to any instrument, or any part of any instrument, which before the Ordinance would have been invalid or ineffectual. *Van Zyl*, in his *Judicial Practice* (p. 569), recognizes the continued existence of the Dutch law on the point, for he says: "A bond may be passed for debts not yet or to be incurred, but it cannot give *jus prioritatis* until the debt has actually been incurred, from which date or dates only the preference begins." I have not referred to the English law, because the system of tacking incumbrances which there prevails might make a difference, and, moreover, the general clause in bonds giving preference in respect of movables does not appear to be there recognized. In the case of *Hopkinson* vs. *Rolt* (9 H. L., 514) it was held by the House of Lords that a first mortgagee, whose mortgage is taken to cover what is then due and also future advances, within a fixed amount, cannot claim the benefit of such advances in priority over a second mortgagee, of whose mortgage he had notice at the time of its execution, and before he made these new advances. In the present case it has been strongly urged that, as the registration of the first bond was due notice to the world of its existence, the applicant advanced money at his own risk, knowing of the existence of the prior bond. It was justly observed by the learned Judge in the Court below, that "the registration of the prior bond was notice to the applicant that he was dealing with persons who had secured their supporters in business for past debts as well as for future advances," but the applicant also knew that the registration of his later bonds would be notice to the first mortgagee of the existence and contents of such later bonds. As was said by Lord CAMPBELL in the English case just cited: "The

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second mortgagee cannot be charged with any fraud upon the first mortgagee in making the advances, with notice of the first mortgage, for by the hypothesis each has notice of the security of the other, and the first mortgagee is left in full possession of his option to make or to refuse farther advances as he may deem it prudent. The hardship upon bankers from this view of the subject at once vanishes when we consider that the security of the first mortgage is not impaired without notice of a second, and that when this notice comes, the bankers have only to consider (as they do as often as they discount a bill of exchange) what is the credit of their customer, and whether the proposed transaction is likely to lead to profit or to loss." In this country the banker or merchant who holds a covering bond from his customer has only to consult the bond list when he is asked to discount a fresh bill or to give fresh credit. If he finds from the list that the customer has passed a subsequent bond he has himself to blame if he discounts the bill or gives further credit without enquiring what liabilities the customer has incurred under the subsequent bond.

I am clearly of opinion that quite independently of the actual knowledge of the parties as to the existence of other bonds than their own, the question of preference between two or more competing creditors under registered covering bonds, does not depend merely upon the priority of registration of the bonds, but upon priority of the respective debts themselves. The dates when the respective debts were incurred are the dates when the respective bonds begin to operate in respect thereof. The bond of which the Bank was the holder was registered before the bond in favour of the applicant, but, if any of the debts proved by the Bank were incurred after the applicant had made advances under his duly registered bond, such advances should be paid in preference to subsequent credits given by Cresswell, Sons & Co. under security of their prior bond. Three of the applicant's bonds, amounting together to £1,600, had been registered, and debts to the amount of £1,500 appear to have been incurred thereunder before any of the debts proved by the Bank were incurred. It is possible, however, that some of the promissory notes proved by the Bank may

have been renewals of previous notes made by the insolvency in favour of the firm, in which case the dates when the debts really originated should be regarded as the date when the bond began to operate in respect thereof. Upon the evidence before the Court, it is clear that the distribution account has been framed upon a basis which the Court cannot sanction, and I am satisfied that if the attention of the Judge in the Court below had been directed to the point he would have agreed with our view. To save further unnecessary costs, the judgment appealed against will be amended, and a direction inserted that any preference awarded to the Bank in respect of debts incurred by the insolvents to the firm of Cresswell, Sons & Co. after any of the debts incurred by the insolvents to the applicant, be set aside, and that a fresh distribution account be framed, according to which preference under the different covering bonds shall be awarded according to priority of the dates when the debts respectively proved were originally incurred. As the judgment of this Court proceeds upon a ground which was not urged in the Court below, it would not be right that the costs should fall on the Bank alone. In the case of *Lawson* vs. *Carr* (10 Moore P. C. C., 174) the Judicial Committee reversed a judgment on a ground not raised in the lower Court, and their Lordships made the following remarks upon the question of costs: "It is true that this point was not argued in the Court below, and their Lordships regret that in this, as it has happened in some other cases, they are obliged to decide a point on which, in truth, no opinion has ever been expressed by the learned Judge from whose sentence the appeal is brought. . . . . They cannot, however, deprive the party of the right to avail himself of the objection, and they must, therefore, recommend that the sentence complained of be reversed, and the action dismissed, with costs in the Court below. They have some doubt whether they ought not to make the appellants pay the costs of this appeal, but they think, upon the whole, that justice will be satisfied by giving no costs of appeal to either side." In the present case the objection was not even raised in this Court until after the Court had brought the point to the notice of the parties, but that does not

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Heydenryck vs. Mackie, Young & Co.'s Trustee and the Standard Bank.

appear to me to be a sufficient reason for ordering the applicant to pay the costs of appeal. It was for the interest of all the competing creditors that their relative rights of preference should be fully discussed and decided without much further delay, and, as the account filed by the trustee of the insolvent estate was clearly based upon a wrong principle, I am of opinion that justice will be satisfied by ordering that the costs in the Court below, as well as in this Court, be paid by such estate.

MAASDORP, J., and HOPLEY, J., concurred.

Ordered accordingly, with costs out of the estate.

[Appellant's Attorneys, VAN DER BYL & DE VILLIERS.
Respondents' Attorneys, FAIRBRIDGE, ARDERNE & LAWTON. J. H. REID & NEPHEW.]

PHILPOTT *vs.* TURPIN.

School Board—Divisional Council Electors—Act No. 35, 1905, *sect.* 10.

The Divisional Council ratepayers, who (under section 10 *of Act No.* 35, 1905) *are qualified to vote at an election of members of a School Board for a Divisional Council district, include occupiers as well as owners of property within the district.**

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Philpott vs. Turpin.

The Fiscal Division of Stutterheim was constituted a school district within the meaning of Act No. 35, 1905, and nominations of candidates to fill six places on the School Board were called for. The applicant Turpin

* This has now been altered by Act No. 25, 1896, sect. 3, which enacts:—"From and after the promulgation of this Act the current Divisional Council Voters' Roll, framed under the provisions of Act 40 of 1889, shall be the voters' roll for school board elections in all divisional areas, and in the case of magisterial areas that portion of the divisional council voters' roll which applies to a field-cornetcy or field-cornetcies constituting or coterminous with such magisterial areas shall be the school board voters' roll for the said magisterial area, provided that where no divisional council voters' roll exists in any area which is constituted a school board area, the current parliamentary voters' roll of the said area or district coterminous with such area shall be the voters' roll for the election of such school board, and the said voters shall be entitled to vote for election of members of the board."

together with six of the respondents were duly nominated. After the polling the respondents were declared duly elected. The number of votes given for the elected candidates respectively were 37, 37, 27, 25, 18, and 17. The applicant received 16 votes, but the polling officers, acting under instructions, had refused to accept the votes of four persons who had tendered their votes for the applicant, on the ground that they were not owners, but merely occupiers as lessees of landed property within the division. All the four persons, however, had paid Divisional Council rates on the properties leased and occupied by them. Notice was given of an application to the Supreme Court to have the election declared invalid and illegal, and set aside, with costs.

The application was heard by MAASDORP, J., sitting as a Divisional Court, and an order was granted as prayed with costs. His Lordship said: "I hold that the four persons named, who were lessees of land in the Division of Stutterheim, are Divisional Council ratepayers, under section 10 of Act 35, of 1905, and entitled to vote at an election of members of the School Board. The polling officers, in pursuance of instructions received from some Government officer, rejected their votes, on the ground that only owners of property were qualified to vote in terms of the section. If the four votes above-mentioned had been received the applicant would have been entitled to be declared duly elected. Upon this ground I declare the election invalid." Against this decision the appellant, in his capacity as Civil Commissioner and as such returning officer, appealed. The unseated candidates did not appear.

Howel Jones (with him *Nightingale*), said that, owing to a misunderstanding, there had been no appearance to oppose the application made to the Divisional Court, and it had been arranged to test the matter by an appeal. The question depended on who are created voters by section 10 of the School Board Act, No. 35, 1905. The section was as follows:

"In every school district two-thirds of the members shall be elected by the municipal ratepayers or by the divisional council ratepayers

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of the school district, according as the district is or is not a municipal area."

In the third clause of the Act, a municipal ratepayer was defined as meaning "a person who pays rates either to a municipality or village management board." There was no definition given of a Divisional Council ratepayer.

[DE VILLIERS, C.J. : The object of defining a municipal ratepayer was to extend the Act to areas under a village management board, as well as to municipal areas.]

To determine who was a Divisional Council ratepayer, reference must be had to Act No. 40, 1889. Section 4 defined a ratepayer as "a person liable to the payment of rates in any division." Section 243 made all persons owning immovable property liable to be rated, and section 244 included lessees of Crown or municipal lands for a period of not less than one year, and specified how such lands were to be assessed.

[DE VILLIERS, C.J. : But section 269 gives the council the right to sue the owner or lessee or occupier, either separately or together.]

The object of that section was to facilitate the recovery of rates, and practically made the lessee or occupier paying the rates the agent of the owner, as in the absence of any agreement to the contrary such occupier or lessee could deduct the amount from his rent, or recover it from the owner. The intention of the legislature was to have members of school boards elected only by proprietors of land within the division.

Sir Henry Juta, K.C. (with him *Percy Jones*), for the respondent, contended that the true construction had been placed on section 10 of Act No. 35, 1905, by the learned Judge in the Court below. The point had already been settled by this Court on the case of *Klerck* vs. *Marais* (8 Juta, 202).

Howel Jones replied.

DE VILLIERS, C.J., said : The question to be decided on this appeal is whether a lessee of property who is also an occupier, and has paid his Divisional Council rates, is entitled to vote in an election of members of a school board in a divisional area. That is the main question

raised. The School Board Act of 1905 provides in section 10 that "in every school board district two-thirds of the members shall be elected by the municipal ratepayers or by the Divisional Council ratepayers of the school district, according as the district is or is not a municipal area, and the remaining third shall be appointed by the Governor." The question which arises is whether the persons who had tendered their votes or had been willing to tender their votes at the election were qualified as voters or not. The words "Divisional Council ratepayers" are not defined in the School Board Act of 1905. Reference has been made to the Divisional Council Act (No. 40, 1889), where we find a definition of the word "ratepayer" in the case of Divisional Council elections. Section 4 gives the following definition: "Ratepayer shall mean a person liable to the payment of rates in any division." The Government, in issuing their circular, seem to have confined their attention to section 243 of the Act, and to have relied upon that section as giving the owner alone the right to vote, and not the occupier or lessee." The section is as follows: "All persons owning immovable property in any division, including any municipality within such division, shall be liable to be rated for the purposes of this Act." Section 244 refers to Crown lands. I quite agree with Mr. *Howel Jones* that if the Act had stopped there, there would have been strong reason for holding that it is only the owner that is to be held liable for the payment of rates. But, then, when we come to section 269 of the Act we find the following: "Every council may, in suing for the recovery of rates, proceed against the owner or lessee or occupier, either separately or both of them in one and the same action, each for the whole rate in any competent court and recover the same by the judgment and process of such Court." Then there are three provisos. The first is: "That any occupier of property on which a rate has been assessed, who is not the owner thereof, and who has not entered into such occupation in pursuance of any agreement for becoming the owner thereof, shall, in the absence of any agreement to the contrary, be enabled to retain or recover from such owner the amount of any rate which he may have so paid, but not any costs or expenses

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which he may have incurred or been condemned to pay in the course of any suit or action brought against him by the Council for non-payment of any such rate." Mr. *Jones*, on behalf of the appellant, contended that this proviso shows that the intention was to make the occupier the mere agent for the payment of the rates, as he may recover the rates again from the owner. But he cannot be regarded as merely the agent, because he is held liable to pay it out of his own pocket. As between the occupier and the Divisional Council, clearly the occupier is the ratepayer. As between the occupier and the owner, no doubt, the occupier may recover again from the owner, but that does not take away the liability of the occupier to the Divisional Council. He is liable to pay rates in terms of the definition clauses, and this view is strengthened by the provisos (b) and (c). Proviso (b) is: "That any occupier of any immovable property shall be liable for any rate which had become due and payable thereon at any time after he entered upon the occupation thereof," showing that, in the contemplation of the legislature, the occupier does become liable to pay rates after he has entered into occupation thereof. Then comes proviso (c): "That any person who may have become liable for any rate as aforesaid, shall continue to be liable for such rate, although he may have ceased to own, to hold on lease, or to occupy the property in respect of which the rate has been imposed," clearly showing that the liability to pay the rate was in the case of the occupier in respect of his occupation. Well, then, if there is any doubt left upon the matter, that doubt is removed by the decision of the Court in the case of *De Klerck* vs. *Marais* (8 Juta, 202). No doubt the question for decision in that case was somewhat different from what is now raised, but in order to decide that question, it was important to ascertain whether an occupier, as such, was liable for the payment of rates. This question was decided in the affirmative. Clearly, the learned Judge in the Court below was correct in holding that the persons who tendered their votes were persons who were entitled to vote, and ought not to have been rejected. Then there is another important question, upon which, however, there has been no appeal, and that is, whether the learned

Judge was right in declaring the whole election null and void. It is an important matter, and may prove an important question in the election of members of Parliament; and I very much doubt if a similar case had arisen, say, in an election for members of any circle returning three members, whether any Court would have set aside the whole of the election. In a recount, possibly the result would have been that the last man would have fallen out, but I express no opinion on the point, but I do think that the Court, in confirming this judgment, should do so without expressing any opinion on that point which has not been raised on appeal. The Court will dismiss the appeal, with costs.

BUCHANAN, J.: I am of the same opinion as to the proper construction of section 10 of Act No. 35, 1905. As to the intention of the legislature, I should have thought that, as the Act was to provide "for the establishment of school boards and for the better management of education throughout the Colony," it was far more likely that it was intended to give the actual inhabitants who resided within the district, and who were the persons interested in the education of their children, the right to control that education, than to entrust the right to proprietors of land only, many of whom might be absentee landlords. The legal point is the only question we have been asked on appeal to determine. As to whether the whole election should have been set aside or not is not now raised, and the unseated candidates do not ask for any review of the order on that ground. Otherwise a great deal might be said in favour of limiting the unseating to the last two candidates on the list, as if the votes tendered had been accepted the position of the first four candidates could not have been affected. That question, however, is not now dealt with by our decision.

HOPLEY, J., also concurred.

Appeal dismissed accordingly, with costs against the Civil Commissioner *ex officii*.

[Appellant's Attorneys, REID & NEPHEW.
Respondent's Attorneys, FINDLAY & TAIT.]

BEHR *vs.* MURRAY.

Pound Regulations—Repeal of Statutes—Right of Detention of Cattle damage feasant—*Common Law Right —Act No.* 15, 1892, *sect.* 25.

Whether the common law does or does not permit the impounding of cattle found trespassing, section 25 *of the Pounds Act No.* 15, 1892, *authorising such cattle to be sent to the nearest pound, is a general law applicable to the whole Colony.*

At the time when Act No. 27, 1905, *was passed, the municipality of King William's Town was under the operation of the General Municipal Act No.* 45, 1882, *and had a legally constituted pound under the provisions of the Pounds Act No.* 15, 1892. *By section* 1 *of Act No.* 27, 1905, *the Proclamation which brought the borough under the General Municipal Act was repealed, except as to things begun or commenced; and under section* 122 *the existing rules and regulations of the borough were to remain legal until altered by the Council. The Act,* inter alia, *authorized the Council to establish pounds and make regulations for their control and management. Before any such regulations had been made, the plaintiff's cow trespassed on the land of the defendant, who seized her for the purpose of impounding her, but the cow was released on payment, under protest, of the trespass money.* Held, *that the seizure was lawful.*

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The respondent Murray sued the appellant Behr in the Court of the Resident Magistrate of King William's Town for 20*s.* damages, alleged to have been sustained by the wrongful and unlawful seizure of plaintiff's cow. The defendant claimed in reconvention 2*s.* 6*d.* as damages done to defendant's property by the cow in question. The Magistrate gave judgment for the defendant, with costs, and dismissed the counter-claim. Whereupon plaintiff appealed to the Circuit Court, which allowed the appeal, and reversed the judgment of the Magistrate, and ordered that judgment be entered for 2*s.* 6*d.* for

plaintiff, and for 2*s.* 6*d.* for defendant, each party to pay his own costs in the Court below and on appeal. The defendant now appealed.

The facts will be found sufficiently set forth in the following reasons given for the Circuit Court judgment by KOTZE, J.P., it being remembered that the appellant therein referred to was now respondent, and the then respondent the present appellant. The learned Judge in the Court below said:

In this case, which is an appeal from the decision of the Resident Magistrate of King William's Town, a somewhat interesting point arises as to statutory interpretation. It appears that in June last a cow, belonging to appellant, trespassed in the garden of the respondent and did damage to the extent of 2*s.* 6*d.* The respondent detained the cow, and would not deliver her up to the appellant until the 2*s.* 6*d.*, the amount of the damage, had been paid. The appellant being of opinion that the borough of King William's Town was without any pound regulations and that the detention of his cow was illegal, at first refused to pay the 2*s.* 6*d.*, but eventually did so under protest in order to release his cow. The appellant then sued the respondent in the Magistrate's Court at King William's Town for the sum of £1, being damages sustained through the wrongful detention of the cow. The cow was detained for the purpose of impounding her for trespass in the garden of the respondent within the borough of King William's Town. The appellant, however, contends that at the date of the detention of his cow, viz., 30th June, 1905, there existed no pound regulation justifying the detention of cattle found trespassing and doing damage, and that by common law the only remedy is an action for the recovery of such damage. The Magistrate has very carefully and very clearly given the reasons which induced him to dismiss the claim of the appellant, the plaintiff below, and to give judgment in favour of the respondent, the defendant below, with costs. The borough of King William's Town had its own bye-laws and regulations, promulgated under the King William's Town Borough Ordinance No. 9 of 1864. Under regulation 2 of section III of these bye-laws, provision was made for the impounding and detention of animals found trespassing. By Proclamation No. 29 of 1903, however, the borough of King William's Town was placed under the Municipal Act of 1882. By paragraph 164 of this Act it is provided that the Pound Ordinance of 1847 and all Acts amending the said Ordinance shall *mutatis mutandis* extend and apply to every municipality hereafter constituted or brought under the operation of this Act.

There have from time to time been several amendments of the Pound Ordinance of 1847, the last of which is the Act No. 15 of 1892, known as the Pounds and Trespasses Act of 1892, which repeals the Pound Ordinance of 1847 and all subsequent Acts dealing with pounds and trespasses. By section 81 of the Pounds and Trespasses Act of 1892 it is provided that the provisions of this Act shall apply to every

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pound in any municipality constituted or brought under the provisions of the Municipal Act of 1882. The provisions relating to pounds as contained in this Act therefore came into operation within the borough of King William's Town, which was brought under the provisions of the Municipal Act of 1882 by the Proclamation No. 29 of 1903. That being so, I agree with the view expressed by the Magistrate that the provisions of the Pounds and Trespasses Act of 1892 superseded and repealed the Pound Regulations which are contained in the bye-laws of the borough of King William's Town promulgated under the Ordinance No. 9 of 1864. So much appears to me to be quite clear and plain. But during the present year the Legislature passed an Act, No. 27 of 1905, called "The King William's Town Borough Act of 1905." By section 1 of this Act the Proclamation No. 29 of 1903, bringing the borough of King William's Town under the operation of the Municipal Act of 1882, and any other law or proclamation contrary to this Act of 1905, are expressly repealed. Section 2 of this Act, however, provides *inter alia* that all *borough regulations* in force in such borough of King William's Town shall (unless repugnant to the provisions of this Act) continue in force until altered or amended under this Act. Section 122 of this new Act is to the same effect. It provides that the "existing rules and regulations of the borough of King William's Town, in so far as the same are not contrary to law, and not repugnant to or inconsistent with the true intent and meaning of this Act, shall remain as legal, valid, and effectual as if the same had been word for word inserted in this Act, until such time as the same shall have been altered by the council in due form of law." By section 123 power is given to the council of the borough to make and alter borough rules and regulations, and section 124 specifies the various heads or matters with regard to which regulations may be so made, including (sub-section 21) the establishment of one or more pounds within the borough and the making of such pound regulations as may be necessary.

The Magistrate appears to have had some difficulty as to the meaning of sections 2 and 122 of the new King William's Town Borough Act, which expressly states that all borough regulations in force in the borough shall, except where repugnant to the Act, continue in force until altered or amended under the Act. He considered that as the former regulations with regard to pounds contained in the bye-laws and regulations promulgated under the Ordinance No. 9 of 1864 had virtually and in effect been repealed by the bringing of the borough of King William's Town under the Municipal Act of 1882, and were not revived by the removal of the borough from the operation of that Act by the new borough Act of 1905, it must be taken, in order to give a meaning and effect to the language of sections 2 and 122 of the new Act, that the Pounds and Trespasses Act of 1892 should be regarded as the existing pound regulations for the Borough of King William's Town until altered by the council as prescribed by these sections. Otherwise the Magistrate thought the borough would be without any pound regulations until new ones were framed and published. He accordingly held that the provisions of the Pounds and Trespasses Act of 1892 still

contain the pound regulations of the borough, and gave judgment against the appellant, Mr. Murray, with costs. While I agree that it is to be regretted that the borough should for the present be without any pound regulations, I think that the words of sections 2 and 122 of the new Act for the borough of King William's Town cannot be so construed as to make the Pounds and Trespasses Act of 1892 still applicable to the borough. It is true that section 2 lays down that, notwithstanding the repeal of the Proclamation 29 of 1903, bringing the borough under the operation of the Municipal Act of 1882, all borough *regulations* in force shall so continue until altered by the council. This, I venture to think, does not mean that the provisions of the Pounds and Trespasses Act of 1892 must be considered as the borough regulations of King William's Town so far as the matter of pounds is concerned. It can hardly be that the Legislature intended this Act of 1892 to continue in force until the borough council altered the provisions of this Act by framing new pound regulations. Such a view seems to me open to a two-fold objection. First of all it would indefinitely, if not perpetually, continue the provisions of the Pounds and Trespasses Act of 1892 as of force in the borough of King William's Town, if the council does not choose to frame new pound regulations. In the next place the Legislature, when speaking in sections 2 and 122 of the existing rules and regulations of the borough of King William's Town, seems rather to have contemplated the local borough rules and regulations in force in the particular borough of King William's Town, with which alone the new Act deals, as distinct from the provisions relating to pounds contained in the Pounds and Trespasses Act, which is a general statute applying generally to the whole Colony. It should be borne in mind that the borough regulations framed and published under Ordinance No. 9 of 1864 were only affected and repealed by the Municipal Act of 1882 so far as inconsistent with that Act. Sections 2 and 4 (sub-section 2) of this Act of 1882 expressly lay that down. It is, therefore, quite possible and probable that many of these borough regulations of King William's Town, dealing with municipal matters other than pounds are still of force, and that it is to these and similar rules and regulations that the language of sections 2 and 122 of the new Act of 1905 applies. It seems then to follow that so far as the matter of pounds is concerned, the borough is at present without any rule or regulation on the subject, for, as already pointed out, the bringing of the borough under the Municipal Act of 1882 caused the Pounds and Trespasses Act of 1892 to operate, which latter Act, while repealing the regulation as to pounds contained in the borough regulations of King William's Town, has now in turn been itself repealed. This may cause a temporary inconvenience to the inhabitants of King William's Town, but the council of the borough has the remedy in its own hands, and can immediately frame and submit for approval new regulations dealing with the subject of pounds within the municipal limits.

As there does not exist any rule or regulation, either statutory or municipal, applying to the impounding of cattle within the limits of the borough of King William's Town, it follows that the cow of Mr. Murray, found trespassing, could not be detained with the view of sending her

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to the pound. Nor does the common law of the colony permit the impounding and detention of cattle found trespassing and causing damage, if what *Voet*, in his *Commentaries*, 9, 1, 3, lays down that, in the absence of pound regulations, the Roman Law is still in force, be true and applicable at the present day. *Voet* refers to *Digest*, 9, 2, lex 39, sec. 1, where *Pomponius* says that if a man finds the cattle of another on his land he must drive them off and will not be entitled to shut them up, for he has special actions if he has suffered damage from the trespass. This may be very well where the owner of the cattle damage-feasant is known and an action *de pauperie* can consequently be brought against him, but if he be a stranger and not known it may happen that the person who has sustained the damage, being unable to discover the owner, will be remediless. It is, however, unnecessary to pursue the subject any further for the purpose of this case, as the respondent in the Court below did not rely on any common law right of detaining or impounding the cow. The Magistrate found that the seizure and detention of the cow were legal, and that the appellant (plaintiff below) could not insist on the delivery up of his cow until the sum of (2*s.* 6*d.*) two shillings and sixpence (the admitted amount of damage sustained by respondent) (defendant below) had been paid. He accordingly gave judgment for the defendant with costs, holding that the counterclaim for 2*s.* 6*d.* damage done fell away. As the cow was, strictly speaking, illegally detained in the yard of the defendant, the plaintiff is entitled, in the absence of proof of any further damage, to the 2*s.* 6*d.* which he paid under protest in order to release his cow. This sum should, therefore, have been allowed him in convention. On the other hand the defendant sustained damage to the amount of 2*s.* 6*d.* for which he duly counterclaimed, and if he had to restore the 2*s.* 6*d.* to the plaintiff, who had paid under protest, it follows that defendant should also have been awarded 2*s.* 6*d.*, the admitted amount of damage sustained by him. The effect of this would be that the one amount or claim is set off or compensated by the other. I therefore think that the judgment below should have been in favour of the plaintiff for 2*s.* 6*d.* and in favour of the defendant on the counterclaim for 2*s.* 6*d.*, each party to pay his own costs. The judgment below will accordingly be altered to judgment in this form. As to the cost of this appeal I do not think, under the special circumstances of the case, that I should make any other order than that each party shall pay his own costs. It is much to be regretted that the parties, who are next door neighbours, did not settle this trifling dispute between them amicably.

W. Porter Buchanan, for the appellant, submitted that the decision was wrong. The General Pound Act No. 15, 1892, was in force in all municipalities under the General Municipal Act of 1882, and formed the pound regulations of the municipality (Act No. 15, 1892, secs. 25, 27, and 81). These regulations were not repealed by Act No. 27, 1905, which took the municipality out of the provisions

of the Act of 1882. Even if there were no regulations by common law, there was the right to impound if a public pound had been established. The passage in *Voet* cited by the learned Judge referred only to cases where no pound was in existence to which cattle trespassing could be sent. If no such pound was in existence, all that *Voet* said was that cattle trespassing could not be detained by the person on whose property the cattle had trespassed.

Benjamin, for the respondent, said the question was, whether section 122 of Act 25, 1905, which contained the existing rules and regulations of the borough, was meant to be included under such rules and regulations the provisions of an Act of Parliament, such as the Pounds Act No. 15, 1892. If so, how could a subsequent regulation made by the Council, alter an Act of Parliament? The learned Judge held that section 122 applied only to the existing municipal rules and regulations, in which nothing was to be found concerning pounds. In the absence of pound regulations there was no legal pound within the municipality. The common law did not provide for impounding cattle found trespassing. *Voet*, 9, 1, 3, and the commentators mentioned in the passage, were discussing pounds created by local laws.

DE VILLIERS, C.J., said: The learned Judge in the Court below ended his judgment as follows: "It is to be regretted that the parties, who are next-door neighbours, did not settle this trifling dispute between them amicably." I quite agree with that remark, and, if it were applicable to that Court, it is equally applicable to this Court; but, of course, if people have rights, it does not depend upon the amount in dispute as to whether they are entitled to assert those rights. It appears that the plaintiff's cow trespassed upon the defendant's land and did some damage. The defendant's servant seized the cow with the object of sending her to the pound, but before she could have been sent to the pound the plaintiff's servant appeared on the scene and demanded the cow. The defendant refused to deliver the cow unless at all events the damage done by her was paid to him.

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Accordingly, under protest, the plaintiff's servant paid 2*s.* 6*d.* Then the plaintiff brought an action, in which he claimed damages for the unlawful seizure of this cow. The Magistrate came to the conclusion that it was not an unlawful seizure, inasmuch as the pound regulations which had been in force in the Borough of King William's Town at the time of the passing of the Borough Act of 1905 were still in force in the municipality. The learned Judge, however, held, on appeal, that these regulations were no longer in force, that there was no pound in the municipality; that consequently there was no right on the part of the defendant to seize the cow, and he gave judgment in favour of the plaintiff for 2*s.* 6*d.*, for unlawful seizure of the cow, and, on the other hand, allowed the counter-claim of the defendant for 2*s.* 6*d.* damage, and ordered each party to pay his own costs, and from this judgment the defendant now appeals. I am inclined to agree with the view of the Magistrate that until the borough made its own pound regulations, the provisions of the Pounds Act of 1892 remained in force as the pound regulations of the Borough. Under section 124 of the Act 27 of 1905 the Borough Council had the power to establish one or more pounds within the borough, and to provide for the erection of pounds, the appointment of pound-masters, and for making such other regulations as may seem necessary or expedient. In point of fact, when this action was brought, or, at all events, when the cow trespassed, no such regulations had yet been made. Accordingly the question arose whether the Act of 1892 was still in force. Section 122 of Act 27, 1905, is as follows: "The existing rules and regulations of the borough of King William's Town, in so far as the same are not contrary to law, and not repugnant to, or inconsistent with, the true intent and meaning of this Act, shall remain in force as legal, valid, and effectual, as if the same had been word for word inserted in this Act, until such time as the same shall have been altered by the Council in due form of law." Now, I am certainly inclined to the view that this section is wide enough to embrace within the terms "rules and regulations" rules and regulations established by the Act of 1892, but I do not wish to found my decision upon this point, because

I am clearly of opinion that, upon other grounds, the seizure of the cow for the purpose of taking her to the pound was perfectly legal. In the first place, there was still a pound in existence within the borough, and there is nothing in the Borough Act of 1905 to make that an illegal pound. But, then, assuming that it was an illegal pound, the defendant was entitled to impound the cow in the nearest legal pound. Section 25 of the Pounds Act is as follows: "Any proprietor upon whose land any animals are found trespassing may send such animals to that pound which is the nearest, by a practicable road or thoroughfare, to the land trespassed upon, and to no other pound." This is a general law applicable to the whole of the Colony, and, therefore, it is not necessary to inquire into the question as to whether the learned Judge correctly stated the common law of the Colony. I found my decision upon this section as to the right of a proprietor of any land to send the animals found trespassing upon it to the nearest pound. If, therefore, there is a trespass upon land within the municipality, the cattle must be sent to the nearest pound within that municipality. But supposing there is no pound at all? In my opinion, in such a case, the owner of the land upon which there has been a trespass is entitled to send the cattle to the nearest pound, even if it is not within the municipality. It is true that until the passing of the Borough Act of 1905 the borough was under the Municipal Act of 1882, and that by section 81 of the Pounds Act, 1892, the provisions of such Pounds Act are made to apply to every pound in any municipality constituted under the Act of 1882. But if, after the passing of the Borough Act of 1905, there was not, as the plaintiff contends, any pound in that municipality—then there would be no pound to which section 81 of the Pounds Act, 1892, could apply, but it does not follow that the inhabitants are deprived of the general right to impound given by section 25. The owner of the land upon which there has been a trespass would still be entitled to this general right given by law, and if there is not a pound within that municipality, he is entitled, under section 25, to impound in the nearest pound. In the present case the defendant had not yet carried out his intention. He

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had seized the cow, and we may assume that he had seized her for the purpose of sending her to the nearest legal pound, and, therefore, in my opinion, the learned Judge in the Court below was wrong in holding that the plaintiff was entitled to recover any sum from the defendant for the defendant's illegal seizure of the cow. The cow was legally seized. On these grounds, I am of opinion that the judgment of the Court below cannot be supported, and that the decision of the Magistrate must be restored. Judgment will be for the appellant, respondent to pay costs.

BUCHANAN, J., and HOPLEY, J., concurred.

Appeal allowed accordingly, with costs.

[Appellant's Attorneys, FINDLAY & TAIT.
Respondent's Attorneys, SYFRET, GODLONTON & LOUW.]

GREEFF *vs.* KELLER.

Water Rights—Riparian Proprietors—Public Stream—Right of Passage—Act No. 26, 1882.

In the absence of a right acquired by agreement, prescription, or some other lawful manner, a riparian proprietor on a public stream is not entitled to take the water out of the river until it reaches his property.

The appellant, a riparian proprietor of land situated on a public stream, being desirous of diverting his share of water for irrigation purposes on the land of the respondent, an upper riparian proprietor, and of leading it thence over the respondent's land, applied for an order authorizing him and his surveyor to enter upon the respondent's land, in order to determine a line of passage to be claimed under Act No. 26, 1882. Held, *that as the appellant had not established any legal right to divert the water before it reached his land, he could not, under the Act of* 1882, *claim a right of passage of water over respondent's land.*

The applicant Greeff, owner of the farm Bakenskloof, on the Oliphants river, in the Oudtshoorn district, served notice on the respondents Keller and others, registered proprietors in undivided shares of the Van Wijk's Kraal, also situated on the Oliphants river, but above the farm of the applicant, to shew cause, if any, why they should not be ordered to permit applicant and a surveyor to enter upon the farm Van Wijk's Kraal in order to determine a line of passage for the conveyance of water from the Oliphants river to applicant's farm Bakenskloof, and the amount of compensation to be offered in respect thereof; in order to enable applicant to give notice in terms of section 3 of Act No. 26 of 1882, and to take further proceedings in terms of the said Act, and, if necessary, of Act No. 40 of 1899, with a view to the acquisition by him of a right of passage of water across respondents' said lands; or such other or alternative order as the Court may deem fit for the relief of applicant, with costs.

In his affidavit, applicant stated that the Oliphants river was a perennial stream, out of which, as a riparian proprietor, he was entitled to a share of the water for agricultural and other purposes. The applicant had furrows supplying water to the northern side of his farm, but none on the southern side, the level of which was such that they could not be reached by means of a furrow taken out of the river on the farm itself. He had acquired a right of abutment or diversion from another proprietor of a portion of the upper farm, between whose property and that of the applicant the properties of the respondents intervene. The applicant had applied to the respondents to meet him with reference to his acquiring a right of servitude of passage of water over their property, but they had refused; and had also refused to permit applicant to take a surveyor over their lands with a view to take proceedings under Act No. 26, 1882, and if necessary under section 10 of Act No. 40, 1899, to determine the line of passage which the required furrow was to take, and to estimate what would be a reasonable amount of compensation to be offered in terms of the said Acts.

Answering affidavits were filed, contesting applicant's claim, and giving details to show that the proposed furrow was not necessary, and that if such a furrow was

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made it would cause great injury to the respondents. They had offered applicant a site lower down the stream, but the offer was refused.

The application was heard in a Divisional Court by BUCHANAN, Acting C.J., and refused, with costs. The following reasons were given in judgment:

Applicant and respondents are riparian proprietors of land on the Oliphants river, a perennial stream, the farm of the applicant being situated below that of the respondents.

The application is a novel one, and renders it necessary to ascertain how far the common law has been altered by the various Acts of Parliament relating to the right of passage of water. In the first place there is not at common law any such right of entry as is here claimed, nor does the Act in terms give any such right. But as the object of the statute, as stated in the title, is "to afford greater facilities to persons having a right to water to convey the same across the lands of other persons," where a right to water exists, I think it may be assumed that the possessor thereof should have such facilities given him as are necessary to make the right of passage accorded by the Act effective and operative. The right of entry seems to me a necessary incident to the right of passage, and I would not dismiss the application on this ground alone.

But section 10 provides that no proceedings authorised by the Act shall be taken in any case where the right to the water for which a passage is claimed is in dispute, until such dispute shall have been settled by the Court. The respondents here deny the right claimed by the applicant. Water-rights have been the subject of considerable litigation in this Colony, and from the volume of decisions there may be deducted the general proposition that at common law water may be classed either as private, or as public or common.

Under the latter class falls water flowing in perennial streams capable of common use, and under the former class, water in streams not public or common, water from springs arising on and kept within private property, water obtained from wells or collected on private property, and such like. To private water there can be an absolute right of ownership just as there may be to any other tangible property. Water in a public stream stands on a different footing. From the very nature of things, there can be no ownership of public water while it is still flowing in the stream and before it has been appropriated. A riparian proprietor may have a right of user, but it is controlled by the rights of others. All who can get to a public stream are entitled to take water for what has been called a primary user, such as for drinking purposes and the sustenance of life. A riparian proprietor has also the right to take water for what has been called secondary purposes, such as irrigation and the like, but the user of the water for such purposes must not be to the detriment of the rights of others. Water taken from a public stream can only be used for secondary purposes on the riparian property, and after such user must be returned

to the stream for the benefit of the public and of the lower proprietors with no other loss than that which irrigation or similar user has caused. If a lower proprietor was to go higher up a public stream and take thence, past an intermediate proprietor's land, water which he was entitled to use only on his own land, he would be interfering with the rights of such intermediate proprietors. At common law the right to take water for irrigation and the like is a right attaching to the ownership of the riparian property, and consequently cannot be exercised until the water of a public stream has reached the property.

What rights, then, have been conferred on riparian proprietors by statute? The first enactment on the subject was Act No. 24, 1876, section 1 of which provides that "every person shall be bound to give a passage across his land to water derived from springs, dams, reservoirs, or any other sources." Section 4 enacts that whoever desires to carry water across "the lands of another shall be bound to prove that the quantity of water whereof he is the proprietor is sufficient for the purpose for which it is destined." Reading these sections together, and having regard to the sources named from which the water to be conveyed is obtained, I think it is clear that the right of passage given by this Act was confined to what are called private waters, in which there might be a proprietorship. There is no direct reference to the water of a public stream, and no attempt has ever been made at law to extend this statute to any such water. These provisions were repealed by Act No. 26, 1882, upon which the applicant now mainly relies for the right claimed. Section 2 of this Act provides that "every person having a legal right to any water in any stream or river, or derived from any spring, dam, or reservoir, and wishing to employ it in irrigation, &c.," shall have the right to convey such water "from and over" any land belonging to any other person. Here again the legislature has refrained from any express mention of public streams, and though the words "any stream or river" are used, they must, I think, be read in conjunction with the words "legal right to water" therein. All the sources of water here mentioned would be sources of private waters, in which there could be a right of ownership as against the world. In Sir *Henry Juta's* selection of *Leading Cases on Water Rights*, I am reminded that when the Act of 1882 was under discussion in Parliament, clauses were proposed which would have made it clear that it was intended to give a riparian proprietor who had a right to take water, a legal right to such water, but the clauses were withdrawn. If this was an indication of the desire of the legislature to limit the right of passage to what was recognised as private waters, it would point against the intention to establish such a right as the applicant now sets up. The jealousy with which upper and lower riparian proprietors guard their respective rights is matter of common knowledge, and may account for the rejection of the clauses referred to. But whatever the cause, the words adopted by the legislature must govern the intention and meaning of the Act. Much stress has, in argument, been placed upon the words in the second section giving a person a right to convey water "from" as well as "over" the land of another person. But I cannot overlook the

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difference in position between the person having a "legal right to water" and one who has only the right to take water. If the words of the section are confined to water to which a person may have a legal proprietary right, there is no departure from the common law. But to read these words changing the common law, and as giving to a person who has only a right to take water, to which water he had no proprietary right until he has appropriated it, a legal right to water still flowing in a public stream, would, in my opinion, be an interpretation not justified by the context. If it is desired to deprive upper proprietors of their rights, apt and clear words should be used in the statute. It should not be left to deduce such an interference with private rights from words capable of bearing a different interpretation and which are applicable to other conditions. As the applicant has not, in my opinion, established a right to the water for which the passage is claimed, this application must be refused, with costs.

The applicant now appealed.

Schreiner, K.C. (with him *Close*), for the appellant, said the appellant had purchased a right of abutment from one of the proprietors of the upper farm, but the appellant was willing to take his water at any suitable spot. The right of abutment was not now raised, but the right of passage of water, under Act No. 26, 1882. To exercise that right in terms of the Act, it was necessary and subsidiary to that right that appellant should be allowed the inspection claimed. The procedure indicated by section 3 could not be followed until such inspection was had. The real point in issue was whether or not appellant had a legal right to water under section 2 of the Act. This question could be as well decided on motion, on the facts before the Court, as if an action was brought.

[DE VILLIERS, C.J.: The right of passage under Act No. 24, 1876, was discussed in the case of *De Wet* vs. *Hiscock* (1 E. D. C. R., 249).]

That case was the *causa causans* of the Act of 1882. The two Acts must be read together. A riparian owner has a legal right to water flowing in a public stream.

[DE VILLIERS, C.J.: How can a riparian owner be said to have a legal right to water in a public stream until the water reaches his property?]

He may not have the ownership, but he has the right to take the water, and having such right section 2 of the Act of 1882 allows him to convey such water "from or

over" another person's land. Nothing could be more in appellant's favour than the arguments of his learned friend, set forth in his *Selection of Leading Cases* (*Juta's Leading Cases*, Water Rights, pp. 461 *et seq.*). The intention of the Act was to give the right to take such water as a riparian proprietor was entitled to from above his own property. A right of abutment would be valueless without such a right. The learned Judge, in his judgment, made no reference to the Act of 1899.

[DE VILLIERS, C.J.: Why not put the Water Court under that Act in motion?]

A Water Court for Oudtshoorn district was there, but it had never sat in any case yet. The whole point in the Court below was the right to inspect, but the decision was that the appellant had no right to the water. Section 10 of Act No. 40, 1899, was then relied upon as showing that the Supreme Court had jurisdiction. The initial question was the right to inspect as a preparatory to further action. The Court would authorize an inspection where it was necessary to further action. (*L. & S.A. Exploration Co.* vs. *De Beers Consolidated Mines*, 10 Juta, 218.)

Sir H. Juta, K.C. (with him *Searle, K.C.*), for the respondents, submitted there were two points for consideration. The first was, had a lower proprietor the right to go on an upper proprietor's land, and take out water there? Secondly, if there was such a right, was appellant entitled to such a roving commission as here applied for? If the appellant had no right to take the water as claimed, the second point falls away. No right as claimed existed at common law, and if the Legislature had intended to give such a right it would have said so. It was not clear whether appellant claimed to be entitled under the Act of 1899 or the Act of 1882, but apparently the latter Act was relied on. If so, it would be found that no water rights were given by the Act of 1882 at all, only a right of passage given to those who had certain water rights. If *De Wet* vs. *Hiscock* was the *causa causans*, then, as there was no *causa*, appellant had no case.

[DE VILLIERS. C.J.: If in dividing a riparian farm, is the man who gets his land away from the banks of the stream no longer a riparian owner?]

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If he ceased to be a riparian owner the owner on the stream could not give him a right to the water.

[DE VILLIERS, C.J.: The word "from" may have crept in merely through the inadvertence of the draughtsman.]

The expression of opinion in *Stewart* vs. *Uniondale Municipality* was probably the reason that no one ever before endeavoured to establish a right such as was now claimed. "Such water," for which a right of passage was given, was only water to which the claimant had a legal right. (See also preamble to Act 26, 1882.) The object of the amendments proposed in the Act was clear, but these amendments were rejected.

Schreiner, K.C., in reply. As suggested in *Juta's Leading Cases*, p. 467, the amendments might have been proposed *ex superabundante cautela*.

DE VILLIERS, C.J., said: This is an appeal against a judgment of a Divisional Court dismissing an application for an order to permit the applicant and his surveyor to enter upon the respondent's land, in order to determine a line of passage for the conveyance of water from the Oliphants river to the applicant's farm, Bakenskloof. The respondent is an upper riparian proprietor, and for the purposes of this case it may be assumed that the river is a public one, and that the applicant, through whose property it flows, is entitled to a reasonable share of the water for the purpose of irrigation. In the absence, however, of a right acquired by prescription or convention, or in some other lawful manner, he is not entitled to take the water out of the river until it reaches his farm. This is a principle underlying all the decisions of this Court in regard to the rights of riparian proprietors. It is a principle also which has been recognized by the English Courts, especially in the case of *Williams* vs. *Harland*, which was cited with approval by my predecessor, Sir SYDNEY BELL, in *Retief* vs. *Louw* (Buch., 1874.) In the former case, it was said by HOLROYD, J.: "Running water is not in its nature private property. At least, it is private property no longer than it remains on the soil of the person claiming it. Before it came there

it clearly was not his property. It may, perhaps, become *quasi* the property of another before it comes upon his premises, by reason of his having appropriated to himself the use of the water accustomed to flow through his lands before any other persons had acquired a prior right to it." In this country the Courts have recognized the right of a person on whose land water rises which does not form part of a public stream to use such water as his own without regard to the claims of lower proprietors. In regard, however, to public streams, the riparian proprietor, in the absence of rights acquired by contract or by prescription, is entitled only to a reasonable share for purposes of irrigation, and he cannot, as of right, claim such reasonable share until the water reaches his land. The question now arises whether a riparian proprietor is entitled, under section 2 of Act 26 of 1882, to claim a right of passage over the land of upper proprietors for the purpose of leading out his reasonable share from a part of the stream flowing above his own land. This right can only be claimed by a person having a legal right to water. The applicant's Counsel contended that a legal right to water embraces the right to lead out water, and does not necessarily mean only the right to the ownership of the water. But if the right to lead out the water only arises when such water reaches his land, it is impossible to hold that the Act was intended to enable a lower proprietor to anticipate that right by exercising it before the water reached his land. If this had been intended nothing would have been easier than to use appropriate language for the purpose, such in fact as appears to have been proposed, but not carried, in Committee of the House of Assembly, when the Bill was passing through Parliament. Much stress has been laid on behalf of the applicant on the use of the words "Convey such water *from* or over land belonging to another person," and it was contended that the employment of the term "from" supports the applicant's case. The use of this word certainly raises some doubt as to the true meaning of the section, but in order to deprive persons of undoubted rights a great deal more is required. The draughtsman may have intended to benefit the lower proprietor at the expense of the upper proprietor,

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but the intention of the Legislature must be gathered from the language construed as a whole, and according to the ordinary rules of interpretation. In support of his contention as to the true intent and meaning of the Act of 1882, the learned Counsel for the applicant has referred to section 10 of Act 40 of 1829. That section certainly confers very wide powers on the Court in certain cases of dispute between riparian proprietors, but it does not apply to a case like the present. The only dispute between the parties is as to the applicant's right of entry for the purpose of finding a suitable passage over the respondent's land for the water which the applicant is entitled to lead out of the public stream. If the applicant is not entitled, as of right, to lead out this water above his own land, he cannot claim such right of passage either under section 2 of the Act of 1882 or under section 10 of the Act of 1889, or under both combined. It may well be that it is for the public interest that such a right should exist, but it should be conferred in unequivocal terms by the legislature. I understand that an irrigation Bill is now passing through Parliament, and an opportunity will thus be offered of giving clear effect to the intentions of the legislature. As the law stands, however, I am of opinion that the learned Judge was right in refusing the application, and the appeal must therefore be dismissed, with costs.

MAASDORP, J., and HOPLEY, J., concurred.

Appeal dismissed accordingly, with costs.

[Appellant's Attorneys, TREDGOLD, MCINTYRE & BISSET.
Respondent's Attorneys, FAIRBRIDGE, ARDERNE & LAWTON.]

RHODESIA CONSOLIDATED, LTD. *vs.* RIXON.

Principal and Agent—Excess of Authority—Ratification.

Where an agent enters into a contract with a third person in excess of his authority, the principal is not entitled, as against such third person, to claim the benefit of part of the contract while rejecting the rest.

The manager of the plaintiff company entered into a written contract with the defendant, whereby the latter undertook to supply to the company a certain quantity of corn at a fixed price, and within a given time, whilst it was orally agreed that the manager should advance to the defendant the sum of £200 for which amount the latter was to sign his promissory note in favour of the manager to be kept in his safe as a security for such advance. The manager deposited the note with his banker as security for his personal overdraft, and, on the due date of the note, the defendant was obliged to pay part of the amount to the banker. The manager had no authority from the company to take the defendant's note in his own favour for the advance. There was no evidence of collusion between the defendant and the manager. Held (on appeal from the High Court of Southern Rhodesia), *that the plaintiff company was not entitled to claim from the defendant more than the balance of the advance, after deduction of the amount which he had been compelled to pay to the banker.*

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The plaintiffs, a joint stock company carrying on business in Rhodesia, sued in the High Court of Southern Rhodesia, on a declaration alleging that the defendant Rixon, on 3rd July, 1905, was advanced by the plaintiffs the sum of £200, in consideration whereof the defendant undertook and agreed to deliver 220 bags of mealies and 80 bags of Kafir corn at the Nellie Mine on or before 31st December, 1905; but that the defendant failed to deliver any part of the said grain, and refused to repay the said advance of £200.

The defendant's plea set forth that previous to 3rd July, 1905, he had had similar contracts with the plaintiff company, in consideration of his depositing promissory notes to cover the advances made; and that it was a condition of all such agreements that the company were to hold such promissory notes as security only, and were not to negotiate or discount them. That defendant had entered into this contract at the request of the company's manager, one Howard, on the same terms as before, and had given his promissory note to Howard for £200 on receiving the advance; that in September he learnt

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that Howard had discounted the note with the African Banking Corporation, whereupon defendant wrote to the company that unless they recovered possession of the note and held same as security, he would retire the note at maturity and consider the contract as terminated; that the company failed to recover possession of the note, whereupon the defendant paid the bank the £200 less £16 18*s.* 10*d.*, which amount he tendered to the company; that defendant was always ready to complete his part of the contract, if the company performed their part.

The facts proved were thus summed up in the judgment of VINTCENT, J., the Presiding Judge at the trial:

In this case the first question to be determined was what was the actual nature of the transactions which took place between Howard and Rixon with regard to the promissory note of £200. The position taken up by the plaintiff company was that as the note was made payable to Walter Howard or order, and not to the company, and with no indication on the note itself showing it was for the company or someone acting for them, the transaction was a private one. Howard in evidence stated that the note had no relation to the company's business. His version to my mind was inconsistent, for at one time he said that the note was given to him by way of a private security as he had no authority from his company to make cash advances on their behalf, and that he wished to secure himself in case the Company repudiated the advance. He later stated that the note was given to him as an act of friendship for his private purposes, and had no connection whatever with the advance made by him on behalf of the Company to Rixon. To my mind, the evidence of Rixon was clear and straightforward, and I accepted without hesitation his version as to what occurred between him and Howard with regard to above matter. The conduct of Rixon on discovery of the fact that Howard had negotiated the note prior to the date it fell due seemed to me to strongly corroborate Rixon's version. I found as a fact that Rixon signed the note drawn up by Howard on the distinct understanding that it should only be negotiated in the event of his failing to carry out the terms of the contract for the supply of grain. In other words, that it was given to the company as security for the repayment of the advance of £200 in the event of a breach of the contract. I believe Rixon's statement that he did not notice when signing the note that it was made out payable to Walter Howard or order.

It was argued by the plaintiff company that inasmuch as the note was made payable to Walter Howard or order, the onus of proving that Howard had authority to act in the way he did was thrown on Rixon. I was of opinion that as the company sued upon an arrangement entered into between Rixon and their own agent Howard it was not within their power to say that Howard had no authority to make this advance. And in these circumstances I was of opinion that

Howard must be considered to have had power to take on behalf of the company, security for repayment of the advance in the event of Rixon's failure to carry out the terms of his contract. This seemed to me nothing more than an ordinary business-like proceeding, and the company might well, had Howard failed to take security, have had very serious cause for complaint against him. I consider that the fact of the note being made payable to Howard or order did not absolve the company from liability, it seemed to me the form of security was a matter entirely in the discretion of Howard, and that even if he acted in a foolish or fraudulent manner my view was that the company and not Rixon should be the sufferer. In the above circumstances I held that the defendant's contention was good, and I accordingly gave judgment for plaintiffs to the amount of the tender, with costs up to date of such tender. All costs subsequent to the date of tender to be paid by plaintiff.

Against this decision the plaintiff company now appealed.

Schreiner, K.C. (with him *Benjamin*), for the appellants, relied on a letter written by defendant to the company's manager, which confirmed a conversation as to the grain and the price, but made no mention of any promissory note. If the promissory note had been made in favour of the company, it might have been different, but it was payable to Howard personally, who had discounted it for his own benefit. There was no implied authority in Howard to take such a note on behalf of the company. The contract was made with Howard, and it was ratified by the company on the only terms contained in defendant's letter, which made no mention of any promissory note, and the company were altogether unaware that any such promissory note had been passed. Giving such a promissory note was not in the ordinary course of business. There was no implied authority to endorse such a note on behalf of the company, nor to use it for the benefit of the agent. Had the proceeds gone to the company it might have been different. (*Hogarth* vs. *Whirley*, 32 L. T., 800; 10 L. R., C. P., 630; *Boustead on Agency*, 2nd ed., 55, 76; *Edmunds* vs. *Bushell & Jones*, 1 L. R., Q. B., 97; *Faure* vs. *Louw*, 1 Juta, 3; *Standard Bank* vs. *Union Boating Co.*, 7 Juta, 257; *Pope* vs. *Devenish*, 2 Menz., 60; *Hind Bros.* vs. *Steamship Co.*, 72 L. T., 79; *Williams* vs. *Evans*, 1 L. R., Q. B., 363; 13 L. T., 753; *McGowan & Co., ltd.*, vs. *Dyer*, 8 L. R., Q. B., 141; *Storey on Agency*, sec. 98.)

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Searle, K.C. (with him *Sutton*), was not heard.

DE VILLIERS, C.J., in giving judgment, said: This is an appeal from the High Court of Southern Rhodesia in an action whereby the plaintiff company claimed from the defendant the repayment of an advance of £200, alleged to have been made by the company in consideration of the defendant undertaking to deliver 220 bags of mealies and 80 bags of Kafir corn at the Nellie Mine on or before 1st December, 1905. The defendant having failed to deliver the articles within the specified time, the company claimed repayment of the money advanced. The defendant, by his plea, admitted the undertaking and failure to deliver the articles, but he alleged that such undertaking formed part of a wider contract, one of the terms of which was that he should deposit as security with the company his promissory note for £200, which the company should not, however, be at liberty to negotiate or discount. The plea further alleged that the defendant did give such a promissory note, which was discounted with the African Banking Corporation, but was not met at maturity, and that he, as the maker, was compelled to pay the sum of £183 1*s.* 2*d.*, and he accordingly tendered the sum of £16 18*s.* 10*d.* in full discharge of the company's claim.

The evidence showed that on 23rd June, 1905, the following letter was sent by the defendant to one Howard, who was then the manager of the plaintiff company: "DEAR SIR,—I beg to confirm the conversation of this morning, by which, in consideration of an advance of £200, to be paid in ten days from this date, I undertake to deliver to the Nellie Mine 220 bags of mealies at 18*s.*, and 80 bags of Kafir corn at 15s., delivery not to be before 1st September, and not later than 31st December." The defendant's evidence, which was accepted by the Court below as correct, and which this Court has no reason to doubt, further showed that while the defendant was signing the letter, which had been written at Howard's dictation, Howard handed him a promissory note in his (Howard's) favour, and requested him to sign it. The defendant said, "I did not know I had to sign note." Howard said, "Oh, yes; in same way as you signed last

year to secure fulfilment of the contract." The defendant said, "Where is that note?" Howard said, "When you fulfilled your contract I tore it up." The defendant said, "If I sign note, it will, I suppose, be held by the company as security against contract and advance of £200." Howard said, "Of course, it will be the same as one you gave last year. It will be held and kept in safe as the last one was, and will be held simply as security for fulfilment of contract and against advance, and, of course, will only be used if you die or break contract." Thereupon defendant agreed to the terms, and signed the note. The evidence of the manager of the bank showed that Howard had an overdraft in the bank, and that in the previous year he had given the bank as security against such overdraft the defendant's promissory note in favour of Howard personally for £225. This was the promissory note to which the parties referred in the conversation just mentioned. In June, 1905, the bank pressed Howard for settlement, whereupon he lodged with the bank the promissory note of the defendant in his favour for £200. On 6th September the bank called upon the defendant for payment of Howard's then overdraft, which the defendant duly paid. His defence accordingly at the trial was, in substance, that as the advance to him had been reduced by the payment thus made by him, he was not liable for more than the balance. The Court below, by its judgment, sustained that defence, and against that judgment the company now appeals.

The plaintiff's replication to the plea did not raise any question as to Howard's authority to take the defendant's note in his (Howard's) favour as security, but in the Court below, and in this Court, the contention of the plaintiff company's Counsel was, that the defendant could not derive any benefit from the payment made by him to the bank, inasmuch as Howard had no authority from the company to take a promissory note in his own favour. I must say at once that I quite concur in the view that, as the company is not proved to have known that its manager had on a previous occasion taken the defendant's note in favour of the manager personally, the company cannot be held to have given the manager any authority to take such notes again from the defendant.

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But the importance of the evidence relating to the previous note transaction lies in this, that it fixed the exact terms on which the contract of June, 1905, purported to be entered into. I am satisfied that those terms have been correctly stated by the defendant, and I am also satisfied that Howard had no authority from the company to enter into any contract with those terms annexed. The company would accordingly have been perfectly justified in repudiating the contract. If there was collusion between Howard and the defendant the company could, after repudiating the contract, claim repayment of the money as having been advanced in fraud of the company. But the company has not repudiated the contract. The case for the company is that it has ratified the contract so far as it is in writing, and that so far as it rests upon an oral agreement between the parties, the company is not bound, because its agent had no authority to take a promissory note made in his own favour. But the contract must stand or fall as a whole. There is no inconsistency between the written and the oral part of the contract, for the latter is only supplementary of the former. The oral part of the contract was that the note for £200 should be the same as the one given in the previous year, and, therefore, the giving of a note by the defendant in favour of Howard was a compliance with the oral part of the contract. Howard may have had no authority to take such a note as security, but the company cannot ratify a transaction of this kind in part, and repudiate it as to the rest. It may not have been bound by the contract, but having elected to take the benefit of a part, it must be held to have ratified the whole of the contract. The bringing of this very action was a ratification by the company of the contract made by its manager with the defendant. The company, by its replication, denied that the terms of such contract were as alleged by the defendant, but when once the truth of the allegation was established, the plaintiff company's right to recover more than the balance tendered by the defendant failed altogether The action is founded upon a failure of consideration for such advance, and as that advance was really reduced by the sum of £183 1*s.* 2*d.*, which the defendant was com-

pelled to pay contrary to the terms of the contract, he was properly held liable only for the balance. The appeal must, therefore, be dismissed, with costs.

BUCHANAN, J., in concurring, founded his decision on the ratification by the company of the contract entered into by their manager with the defendant.

HOPLEY, J., also concurred.

Appeal dismissed accordingly, with costs.

[Appellant's Attorneys, FINDLAY & TAIT.
Respondent's Attorneys, FAIRBRIDGE, ARDERNE & LAWTON.]

THE STAG LINE *vs.* THE TABLE BAY HARBOUR BOARD.

Harbour Board—Dock Regulations—Contract—Breach of Duty.

The plaintiffs, being the owners of the steamer C., which required to be painted, entered into a contract by which the defendant Board undertook to take her into the graving dock, but no specific day for doing so was agreed upon. Before the date of this contract the owners of the ship M. had engaged the dock for a certain day, but owing to detention on the coast, the M. did not arrive in Table Bay by the day agreed upon. When the M. arrived two days later, the Board allowed her to be docked, charging the owners with dock fees from the day agreed upon. The result was that plaintiff's steamer C. could not enter the dock until about fourteen days after the date on which the contract for docking her had been entered into. Among the regulations for the management of the docks, made by the Board under its statutory powers, was one to the effect that, "on failure to place a vessel in the dock on the day appointed for that purpose, such vessel shall, if the dock be required, lose her turn on the list, and the owner shall be liable to pay to the Board the expenses which may have been incurred in preparing the dock for her reception." Held, *that this regulation*

did not make it compulsory on the Board to make the M. lose her turn ; and that, as under the circumstances disclosed in evidence, it was not unreasonable to allow the M. to enter the dock when she did, the Board was not liable in damages for the detention of plaintiff's steamer C.

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The plaintiffs, a limited liability company owning sundry steamships, among others the steamer *Clematis*, sued the defendants, the Table Bay Harbour Board, constituted under Act No. 36, 1896, in which was vested with other property the graving dock at the port of Cape Town, in an action to recover the sum of £1,000 damages.

The case was tried in a Divisional Court before MAASDORP, J., who gave judgment for the defendants, with costs. Against this decision the plaintiffs appealed.

The effect of the pleadings and a summary of the essential facts proved at the trial, are sufficiently set forth by the Presiding Judge in the following reasons for his judgment :

The plaintiff company allege in their declaration that on 20th March, 1901, they entered into an agreement with the defendants, whereby the defendants undertook to place their ship, the *Clematis*, in the graving dock of the Table Bay Harbour for cleaning and painting, on 27th March, upon the terms and conditions contained in the printed form of contract, which was duly signed by all the necessary parties. The plaintiffs were on the appointed day prepared to place their ship in the dock, but the defendants failed to take her in, and delayed doing so until 10th April. They now claim as damages sustained by them, by reason of this delay of fourteen days, the sum of £1,000. It appears there was a prior undertaking on the part of the Harbour Board to place another ship, the *Matabele*, in the graving dock on 25th March. That ship did not arrive until the 27th, when she was docked, and she was not undocked until 29th March. It was the presence of the *Matabele* in the graving dock which prevented the *Clematis* going in. And in anticipation of this fact being set up as a legal impediment to docking the *Clematis* on the 27th, the plaintiffs proceed to state that upon the failure of the *Matabele* to go into the graving dock on 25th March, which was the day appointed for the purpose, she lost her turn on the list in accordance with Regulation No. 45, sub-sec. (*d*) of the Harbour Board. It is alleged that if this regulation had been observed, the graving dock would have been available for the *Clematis* on 27th March. The defendants deny that they agreed to place the *Clematis* in the graving dock on 27th March, and say that the dock was not available for that ship until 10th April, being occupied by the

Matabele until that day, but they admit that they engaged to place the *Clematis* in the dock in terms of the printed document which was put in at the trial. The first point to decide is, whether there was a definite agreement on the part of the defendants to dock the *Clematis* on the 27th. It appears from the evidence of Captain Stephen, the dock superintendent, that when he was approached in the matter by the agents of the ship, which had not then arrived, he entered into the agreement mentioned, pointing out to the agents that he had already undertaken to place the *Matabele* in the dock on 25th March, and he was under the impression that she would be disposed of in a couple of days, in which event the dock would be available for the *Clematis*. He says he never definitely undertook to dock the latter ship on the 27th. This is the only direct evidence in respect of the terms of the agreement at the time it was entered into, the agent who made the contract on behalf of the ship not having been called at the trial. Captain Stephen says he never enters into an engagement by which he undertakes to put any vessel on an appointed day out of the dock to make room for another, and he did not do so on this occasion. I am bound, under the circumstances, to take the evidence of Captain Stephen as conclusive upon this point, there being no direct contradiction of it. Captain Stephen is supported in his statement by a passage in a letter written by the agents of the *Clematis* on 1st April, to the following effect: "The steamer *Clematis* arrived here on the 24th ult., the dry dock having been booked by the *Matabele* from the 25th, which latter steamer we were informed would leave the dock again on the 27th ult." There is no pretence here that the 27th was fixed in express terms as the day for the docking of the *Clematis*. In the printed undertaking no date is fixed. I come to the conclusion that the plaintiffs have failed to prove that there was an agreement to place the *Clematis* in the dock on the 27th. The defendants undertook, on the 20th, to place the *Clematis* in the dock, and I am of opinion that they then entered into a binding contract to do what was required within a reasonable time, having regard to the regulation of the Harbour Board, and the ordinary course of business at the port. These agreements are entered into in contemplation of the regulations and the ordinary course of business at the port. It would appear that, in the ordinary course, it would be reasonable to expect that a ship would be docked within such time as the necessary arrangements can be made if the dock is available, or so soon after as the dock becomes available. Independently of the consideration of the further question raised by the plaintiffs, which I still have to deal with, it would seem that the *Matabele*, which had a prior claim, and had to be disposed of, occupied the dock until 9th April. The work on the *Matabele* took longer than was anticipated, and the dock was not available for the *Clematis* until 10th April, when she was actually docked. But it is contended on behalf of the plaintiffs that in calculating the reasonable time within which the defendants should have carried out their undertaking to dock the *Clematis*, the alleged prior rights of the *Matabele* should not enter into the calculation, because she had, under the Harbour Board regulations, forfeited her claim to be docked through

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her failure to be placed in the graving dock upon the appointed day. The regulation in question is to the following effect: "On failure to place a vessel in the graving dock on the day appointed for that purpose, such vessel shall, if the dock be required, lose her turn on the list, and the master shall be liable to pay to the Board the expenses, if any, which may have been incurred in preparing the dock for her reception." It seems to have been contemplated by the regulations that a book should be kept, in which the names of vessels applying for the use of the graving dock should be entered, and that such vessels should be placed in the dock in the order in which they appear on the list, providing all the prescribed conditions were fulfilled. The above-mentioned rule provides for the forfeiture of this right of precedence under certain circumstances. It was contended for the plaintiffs that the moment a vessel fails to be placed in the dock on the appointed day, she, as a necessary consequence, lost her place on the list, and the next vessel could claim the right to go in. If the regulations were strictly construed, a vessel would lose its turn on the list even where the failure to go into dock arose from no fault on her part, and indeed, when the failure was due to default on the part of the Harbour Board. That could never have been intended. The regulation seems to me to provide for a forfeiture of a right, and for a penalty upon failure to enter the dock through default of any vessel, as a matter of contract between that Harbour Board and that particular vessel, and is no direct concern under its contract of any other vessel on the list. In the analogous case of forfeiture provided by contract, the rule is that a forfeiture of rights should not be too readily assumed, and in this case, I think, it was in the discretion of the dock superintendent to take into consideration all the circumstances before he pronounced that the *Matabele* had lost her right to go into dock. I can find nothing in the evidence to show that he exercised his discretion in an unreasonable manner, even if it were in the jurisdiction of the Court to interfere with his discretion, a point which it is unnecessary to decide. I am of opinion that the Harbour Board placed the *Clematis* in the graving dock in such reasonable time as they had by their contract undertaken to do, when they put her in after the dock was vacated by the *Matabele* on 9th April. That being my view of the case, it is unnecessary to decide whether the measure of damages contended for in the declaration is the correct measure to apply in a case like the present. Judgment must be given for the defendants, with costs.

Schreiner, K.C. (with him *Close* and *Douglas Buchanan*), for the appellants, submitted that the evidence showed that the *Clematis* had lost by the delay in docking the sum of £731, which she would otherwise have secured from the charterers in England under a time charter; and which sum she would have recovered had the Harbour Board regulations been adhered to by the defendants. These regulations were imported into and

must be read as forming part of the contract between the parties. Sub-section (b) of Regulation No. 45 gave the dock superintendent discretion in case of distressed vessels, but he had no discretion under sub-section (d). That sub-section was compulsory that the defaulting vessel shall lose its turn. The regulations bound both sides. The Board was a public body, and there must not be any favouritism. (*Gough* vs. *Port Elizabeth Town Council*, 16 C. T. R., 229; *Wright* vs. *Paterson*, 5 Searle, 29; *Bristow* vs. *Paterson*, 5 Searle, 29; Magistrates Cases, 8 Juta, 25; *Harbour Board* vs. *Bucknall Bros.* 14 C. T. R., 351.)

Searle, K.C. (with him *Murray Bissett*), for the respondents, contended that on the contract the action had broken down. The Board could not be sued on their own regulations. The regulation in question imposed no duty on the Board, but on third parties. The action was unreasonable, as the damages claimed could not have been in contemplation of the parties. The sub-section (d) only had reference to the contract with the agents of the *Matabele*, and not with plaintiffs. (*Alice Municipality* vs. *Crallan*, 14 S. C. R., 379; *Table Bay Harbour Board* vs. *Bucknall S. Lines*, 21 S. C. R., 220.)

Schreiner, K.C., in reply, cited *London Association of Shipowners* vs. *London and India Docks Joint Committee* (L. R., 3 Chy. Div., 1892, 252); and *Hopkins* vs. *Mayor of Swansea* (4 M. & W., 640).

De Villiers, C.J.: This action is founded upon a contract by which the defendant Board is alleged to have undertaken to take the plaintiffs' ship *Clematis* into the graving dock on 27th March, 1901. The finding of the Divisional Court was, that a contract to dry-dock the *Clematis* had been duly made, but that no date had been fixed upon in the contract. The written contract did not fix the date, but there was evidence for the plaintiffs to the effect that the 27th had been agreed upon, whereas the evidence for the defendant was that the date was not fixed. Incidentally, the declaration refers to one of the regulations of the Harbour

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Board, which is said to have been in the contemplation of the parties to the contract, and to be binding upon them; but if that regulation is to form the basis of the contract the date would have to be the 25th instead of 27th March. In so far as the plaintiffs rely upon an oral agreement that the ship was to be taken into dock on the 27th, I quite agree with the Court below that no such definite agreement was made.

Assuming, however, that the regulation just referred to was in the contemplation of the parties at the time when they entered into the contract, the question arises whether there was any breach of contract on the part of the defendant Board in not taking the *Clematis* into dock until 10th April. The delay was occasioned in the following manner. Before the date of the contract in question, the dock superintendent had agreed with the owners of the ship *Matabele* to take her into the graving dock on her arrival, which was expected would be on 25th March, from which day dock dues were to become payable. This was during war time, and the agents of the *Matabele*, which was used in carrying mails on the east coast, had been instructed to have her docked immediately. She did not arrive until the 27th, on which day she was allowed to enter the dock. On this point the dock superintendent gave the following evidence: "I knew the necessity for despatch in the matter of the *Matabele*. When the *Matabele* did not arrive on the 25th I still knew that she was coming down, and that, barring accidents, she would be here almost immediately. To have taken the *Clematis* in would have meant incurring a day's delay. The half of the dry dock, which is all that the *Matabele* required, is always prepared, but the whole of the dock, which would have been required for the *Clematis*, required a day to prepare, and I would have had to put the *Gudrun* out of her berth until the *Clematis* left. I felt that if I had to begin to prepare the dock for the *Clematis* the *Matabele* would arrive whilst in the midst of the preparations. I thought the *Matabele* required only painting and cleaning." The contention on behalf of the plaintiffs is, that under the Regulation 45 (d), the Board had no discretion, but was bound to refuse admission to the

Matabele into the dock, on the ground that the agents had failed to place her in the graving dock on 25th March, being the day appointed for that purpose. The regulation reads as follows: "On failure to place a vessel in the graving dock on the day appointed for that purpose, such vessel shall, if the dock be required, lose her turn in the list, and the owner, master, or agent of such vessel shall be liable to pay to the Board the expenses, if any, which may have been incurred in preparing the dock for her reception." The object of this regulation was not to confer rights on other ships, but to enable the Board, whilst refusing to allow admission to the ship which is in delay, to charge her with the expenses incurred for her reception. Under sub-section (f) the dock superintendent "may, at his discretion, allow any vessel which shall have arrived in the harbour in a distressed or leaky condition, to enter the graving dock before all other vessels in the entry-book"; but it does not follow that he was deprived of all discretion in every other case. To give one particular ship a preference over all other vessels in the entry-book would be such a wide exercise of discretion as to require special authority under the regulations of the Harbour Board, but this is not the kind of discretion which was exercised in the present case. A berth had been engaged for the *Matabele* before the agents of the *Clematis* asked for a berth; and although the *Matabele* did not arrive on the very day agreed upon, there were circumstances in the case which might reasonably induce the superintendent to keep a berth for her although she was late. Anyhow, I cannot read Regulation 45 (d) as depriving the Board itself of all discretion in a case like that of the *Matabele*, and in the present case the Board has adopted the act of the superintendent. That regulation contains provisions in favour of the Board which it may, in my opinion, waive in favour of a particular ship, if circumstances exist which, in the opinion of the Board, justify such a waiver. Under circumstances such as those under which a berth was engaged for the *Matabele*, the Board was not bound to insist upon her losing her turn. Cases could be imagined in which it would be a breach of duty towards other ships if special

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favour is shown to some particular ship, but the present is not such a case. Nor is it part of the plaintiffs' case that the defendants have been guilty of a statutory or quasi-statutory duty which it owed to the plaintiffs: The claim is for damages for breach of contract, and as the contract relied upon has not been proved, the judgment of the Court below was rightly given for the defendants. The appeal must be dismissed with costs.

BUCHANAN, J.: I concur. The regulations of the Board, having been properly promulgated, have as much effect as if they had been contained in the Act which authorized them. The question, then, is the construction to be placed on the regulations. The regulation in question does not seek to impose any duty on the Board, but was evidently passed to protect the Board against loss from the default of the vessel which has contracted for the use of the dock. I cannot find that there has been any breach of the contract entered into between the plaintiffs and the Board.

HOPLEY, J., also concurred.

Appeal dismissed accordingly, with costs.

[Appellants' Attorneys, FAIRBRIDGE, ARDERNE & LAWTON.
Respondents' Attorneys, REID & NEPHEW.]

COLONIAL GOVERNMENT AND TABLE BAY HARBOUR BOARD *vs.* CAPE TOWN TOWN COUNCIL.

Green Point Common—Waste Lands—Title—Act No. 26, 1893.

Repeated Municipal Acts of Parliament vested generally in the Town Council of Cape Town the waste lands within the municipality formerly under the control of the Burgher Senate, and Act No. 26, 1893, *further expressly specified "the Green Point Common, in so far as it was situated within the municipality." Notwithstanding the then existing statutes, the Governor of the Colony, in* 1840, *had granted certain waste lands*

to the Imperial Ordnance Department, and guaranteed that no buildings should be erected over a certain specified surrounding extent described on a diagram annexed to the grant, and further, that any buildings then in existence on that area should be removed. This specified area had, since the date of the grant, been used as common by the inhabitants for more than the period of prescription. The Divisional Court declared this specified extent to be part of the Green Point Common, and that the title therein was now vested in the Town Council, subject to a servitude of the clearance rights guaranteed to the Ordnance officials. An appeal against this judgment dismissed.

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Colonial Government and Table Bay Harbour Board *vs.* Cape Town Town Council.

An action was brought in a Divisional Court for the declaration of rights of the respective parties to certain lands which were claimed to be portion of the Green Point Common within the Municipality of Cape Town. The decision declared the dominium in the property to be vested in the Town Council, subject to a servitude in favour of the Imperial Ordnance Department. From this decision the Colonial Government and the Table Bay Harbour Board now appealed. The issues raised and necessary facts proved will be found set forth in the following reasons for judgment given by the Presiding Judge, DE VILLIERS, C.J. :

The original defendants in this action were the Colonial Government, the Table Bay Harbour Board, and Colonel Hoskyns, as representing the Secretary of State for War. On behalf of the last of the three defendants an exception was taken to the exercise of jurisdiction by this Court over him in his said capacity without the consent of the Crown, and the exception was allowed by me. The only remaining defendants, therefore, were the Colonial Government and the Harbour Board.

The action is for a declaration of the respective rights of the parties in respect of a portion of land which formerly formed part of the Green Point Common, for an interdict restraining the Government from granting the land to the Harbour Board, for an order of ejectment against the Board, for a declaration that the plaintiff council and inhabitants of Cape Town are entitled to the free and unobstructed use of and access to the foreshore, for an order compelling the Board to remove a fence placed round the land, and for damages against both defendants.

The plaintiff's claim to the control over and ownership of the land in dispute is based upon free, continuous, and uninterrupted user from time immemorial by the inhabitants of Cape Town, and upon the

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different statutes by which the rights of the plaintiff council and of its predecessors, as formerly constituted, were from time to time extended and defined.

The defendants, by their joint plea, deny any uninterrupted user by the inhabitants, and they also deny that the land now in question ever formed part of the Green Point Common, or of any land vested in the Council by the different statutes relied upon by the Council. The defendants more especially rely upon the fact that the land in dispute forms part of an area as to which a guarantee was given in 1840 by the Colonial Government to the Imperial Government that no buildings would be suffered to be erected thereon. This guarantee appears in a grant made by the Governor on 1st June, 1840, to the officers of Her Majesty's Ordnance of the Laboratory, with a small portion of ground surrounding the same, the effect of the guarantee being to create in favour of the Imperial Government a servitude upon the area just mentioned, preventing its owners or occupiers from thereafter erecting any building thereon.

The defendant Board filed a claim in reconvention demanding payment of £12,000 as compensation for improvements, in case it should be decided that the Council is entitled to eject the Board from the land in dispute. After the arguments had been completed I understood it to be agreed between Counsel that the Harbour Board should remain in possession of the land in dispute and pay to the Council such compensation as should be settled by a referee, the only matter left for future argument being the name of the referee. I did not accordingly enter fully into my reasons for holding that the land in dispute was vested in the Council subject to the servitude in favour of the Imperial Government, and I gave no judgment on the defendant's claim in reconvention, which obviously would fall to the ground if the order of ejectment was not made. It is clear that if the order of ejectment had been made, the Board, which had all along acted in perfect good faith, would have been entitled to full compensation for the improvements made by it to the extent of the enhanced value of the land. In referring the value of the land in dispute to a referee the judgment excluded any portion of the land that may have been reclaimed by the Board from the sea, and it also excluded the value of any other improvements made by the Board. I added that in estimating the value of the disputed piece of land the referee would have to bear in mind the fact that the Council would not have been entitled to erect buildings thereon or sell it for building purposes, but it was not necessary to give a special direction to that effect to the referee.

In the consideration of this case it was necessary to assume the validity of the servitude for two reasons, viz.: Because the Imperial Government was no longer a party to the suit, and because no steps had been taken to set aside the grant of 1840. I am by no means satisfied that, even at that time, the Colonial Government had the right to issue the grant in the form in which it was issued. From very early times there had been a governing municipal body for Cape Town with a right of control over waste lands within the municipality. From and inclusive of the ground afterwards used as cemeteries, the

land between Lion's Rump and the sea was an open space, to which the burghers had rights of access as well as grazing rights. Within that large open space forts and other military buildings were from time to time erected, and, of course, the successive municipal bodies exercised no control over them. Among these forts was the Kijk in de Pot battery, which was afterwards known as Fort Wynyard, and which stood within the area subjected to a servitude by the grant of 1840. When, at different times, grants of portions of the waste lands were required to be made, the practice was not quite uniform. Sometimes, as on 23rd October, 1827, two members of the Burgher Senate, acting with the consent of the Government, would make the grant, and at other times, as on 9th February, 1802, the grant would be made by the Government. The latter was the strictly correct course, because the nominal title to all ungranted land remains with the Crown, but where a public body has a statutory title to land there would seem to be no valid reason why such body should not, acting with the approval and under the authority of the Crown, pass a valid title to others. In fact, we find that in all the statutes vesting waste land in municipal bodies there is always a provision that they shall not be allowed to alienate without the consent of the Crown. This provision is mainly due to the desire of the legislature to prevent alienations except for legitimate public purposes, but it may also have been partly due to the necessity of upholding the doctrine that every title of land should originate with a grant made by the Crown or with the consent of the Crown. Coming next to the land known as the Green Point Common, the documentary evidence satisfies me that even before 1840 the common included the land now in dispute. With the exception of Holm, the old witnesses could not speak to what took place before 1840, but as far back as they could remember the land was considered part of the common on which the cattle of the inhabitants grazed, and over which people freely went for the purpose of having access to the seashore. As to Holm, who is seventy years of age, he says that he remembers the laboratory, and used to play in the neighbourhood as a child. "The common," he said, "was open right from the cemeteries to Three Anchor Bay. The municipality regulated all the common. One could not take a load of sand without a permit." By Ordinance No. 1 of 1840 the municipality was re-modelled, but the Commissioners were not deprived of the rights which had been exercised by the Burgher Senate and subsequent municipal governing bodies. Not long after the passing of that Ordinance the Government made the grant of 1840, and this fact has been relied upon as showing that the municipality had no right over the land. It should be remembered, however, that the only land actually granted was the land on which certain Government buildings stood, and over which the Commissioners could claim no right of control. The so-called guarantee included a much larger area around the land granted, and the Government may well have believed that it was quite safe in giving the guarantee, seeing that, without the consent of the Government, the Commissioners could not have disposed of the land for building purposes. The guarantee could not, however, deprive the municipality

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of its rights in respect of the waste land not granted to the Imperial Government. That land remained under the control of the municipal body, established in 1840, and afterwards under the control of the municipal bodies which succeeded it. The evidence given on behalf of the plaintiff Council is conclusive on this point, and there is practically no evidence to contradict it. The neighbouring land on which the Somerset Hospital was built has been admitted by the Government to be land vested in the Council. The land in front of the Somerset Hospital and immediately abutting on the strip of land in dispute was actually hired by the Harbour Board from the plaintiff Council. Much reliance has been placed on behalf of the defendants on the fact that the Council raised no objection to portion of the land in dispute being granted to the Cape Canning Co., but any admission which may have been impliedly made by the Council in the course of the correspondence on this subject cannot affect its legal rights in respect of the rest of the land in dispute. The correspondence between the Board and the Council in 1887 shows that at that time the Council was regarded by both parties as the owner of the land between Gallow's Hill and the boundary of the Board's property. In 1893, when the Act establishing the present Council was passed, the land now in dispute was still treated as part of the Green Point Common over which the plaintiff had control and by means of which the inhabitants had free access to the seashore. It is true that the Board tipped some clay and rubbish on to part of this land in the same way as some of the inhabitants seem to have done, but it does not appear that the plaintiff Council was made aware of the fact. For the rest the ground around Fort Wynyard was open and was used for sporting purposes as well as for the grazing of cattle. People wandered about there freely, and used to go over it for the purpose of bathing and fishing in the sea. Such was the state of affairs when Act No. 26 of 1893 was passed. The 111th section of that Act vests in the Council all property previously vested in the Commissioners, but even if that section had not been applicable, I am clearly of opinion that under the 110th section of the Act the Council can make good its claim. That section vests in the Council the property of and in the Green Point Common so far as it is situated within the municipality. The land in dispute was part of the Green Point Common, and was situated within the municipality. Since 1893 the Harbour Board has enclosed the land, and has expended considerable sums of money on it, but there is no proof of such acquiescence on the part of the Council as to deprive it of its undoubted rights to protect the interests of the inhabitants whom it represents. The Imperial Government appears to have waived in favour of the Board the right to prevent building on the land, but such waiver cannot confer on the Colonial Government the right to transfer the land itself to the Harbour Board in contravention of the statutory rights which the legislature has conferred on the plaintiff Council. The grant which was made in 1840, and which has never been set aside, must be respected, but the terms of that grant are quite consistent with the retention by the Council of the ownership of the portion of land not specially granted. The interests of all parties will be safeguarded if

the land now in question, no part of which has been so granted, is declared to be the property of the Council subject to the servitude in favour of the Imperial Government. The obvious consequence would, under ordinary circumstances, be that the Government would have to be interdicted from carrying out its avowed intention of transferring the land to the Board. The parties, however, have agreed that the Board shall remain in occupation subject to the payment of compensation to the Council, and any over valuation will be prevented if the referee bears in mind that the Council would not have had the right to sell the land for building purposes, and that reclaimed land and the value of improvements made by the Board must be excluded. The defendants will pay the costs of the action.

Sir Henry Juta, K.C. (with him *Nightingale*), for the appellants, submitted that the Cape Town Town Council Acts must be regarded as private Acts, and could convey only such property as belonged previously to the municipality. It was evident that the ground in question never vested in the municipality, as the grant by the Governor in 1840 was quite inconsistent with any such vesting. The Green Point Common referred to in the Municipal Act of 1893, must be taken as referring only to such commonage as remained after deducting the land mentioned in the Governor's grant of 1840. The action of the Council in disclaiming any right over the portion of the land sold to the Canning Company by Government, and to the proposed exchange of part of the commonage for part of the ground round Fort Wynyard, showed that the Council heretofore had no right over this ground. As to the evidence of user, though prescription might run against the Crown where land could be alienated, the question whether prescription would run where land had been specially reserved for military purposes had never been decided; moreover, the Municipal Acts specially provided that they should not be construed so as to affect any right or title of the Imperial Government. This ground was not waste ground which could be included in the commonage. The Act of 1893 could only refer to such commonage as then existed (*Blanckenburg* vs. *Colonial Government*, 11 S. C. R., 90; *Jones* vs. *Town Council of Cape Town*, 12 S. C. R., 19; *French Hoek Municipality* vs. *Hugo*, 2 Juta, 230; *Colonial Government* vs. *Town Council of Cape Town*, 19 S. C. R., 87; *Maxwell on Statutes*, 3rd ed., 419.)

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Searle, K.C. (with him *McGregor*), relied mainly on the provisions of sections 110 and 111 of the Municipal Act of 1893, which repeated and amplified the grants made to the municipality under the previous statutes. The prescriptive user showed this was part of Green Point common when the Act of 1893 was passed. If so, whether the intention was to grant this land or not, the land was granted, and the statute must, like a contract, be held as conclusive. The dealings of the Council in regard to the Canning Company's land and the land round Fort Wynyard had probably been entered into in ignorance of the Council's legal position. (*Heatlie* vs. *Colonial Government*, 5 Juta, 353.)

Sir Henry Juta, K.C., in reply: The onus was on the plaintiffs to establish their title. "Waste land" did not include a commonage, nor did it include land which had been specifically cut off and reserved for military purposes. When the grant was made this could no longer be regarded as waste land.

BUCHANAN, J., in giving judgment, said: This action was brought to declare the rights of the parties in the suit in respect of a certain portion of ground within the Municipality of Cape Town. A grant was made by the Governor of the Colony in 1840, of a portion of this land to the officers of Her Majesty's Ordnance, on which had been erected what was called the old laboratory, in reality a magazine, in which cartridges were loaded, together with a limited area round the same, and with all the military buildings and fortifications erected thereon, with a guarantee to the grantees that no buildings whatever should be allowed to be erected on a specified extent of land round the magazine. It is a portion of this surrounding extent, over which what has been spoken of as a right of clearance exists, that is in dispute in this case. This right of clearance seems to mean that there should be no buildings erected upon this ground, or, if any buildings had been erected, that these buildings could be removed. When the grant was made it does not appear that there were any buildings upon this surrounding piece of land. When the case came before

the court of first instance, this reservation—this right of clearance—was construed to mean a servitude imposed by the Governor upon the rest of the ground situated within the specified area, in favour of the officers of the Ordnance. There has been no appeal against this part of the judgment. But an appeal has been brought against the portion of his lordship's judgment, which declares that this land is now vested in the Town Council, subject to the servitude. It is claimed, on behalf of the appellants, that the property in this land is vested, not in the Town Council, but in the Governor. In this country in theory all lands are vested in the Crown in the first instance, and private ownership can always be traced back to some specific grant from the Crown. But there may also be a statutory grant of Crown property. It appears that in 1839 the Municipality of Cape Town was first formed, and in 1840 an Act was passed which vested in the then Municipality certain specific properties named, and also the waste lands situated within the Municipality which had been vested in, or committed to, the administration of the then late Burgher Senate, and it is said that the whole of the land in question had been subject to the control of the Burgher Senate. But we find that in 1840, shortly after the Ordinance was passed, several grants were made by the Governor of the Colony of portions of the waste land within the municipality, and the ground now in dispute was also granted after this Ordinance of 1840 was enacted. It is alleged on the part of the Council that the Act of 1840 and subsequent Acts are in effect statutory grants of these waste lands, which were formerly within the municipality under the administration of the Burgher Senate. If this land had been transferred out and out by the statute from the Crown to the municipality, it is certainly inconsistent with any such transfer that the Governor should still issue titles direct from himself, not on behalf of the municipality, but from the Crown, to a number of different grantees, of various portions of waste land. These grants have been in existence since 1840, and are not now in question, and I think that now it is too late to say that these grants are now invalid in consequence of competing rights. The municipality are quite

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willing that the specific property granted in 1840 to the officers of the Ordnance shall remain vested in the military authorities, and they make no claim in respect of the specific property so granted, but they claim, by virtue of these different statutes, the other property over which only a servitude was created, but which was not granted away by the Crown. The Ordinance No. 40 was passed for a period of twenty years, and in the renewing Act of 1861, similar words were used as to the waste lands within the municipality. In 1882 the next municipal Act was passed, and similar words are again used therein. In 1893 the present Act was passed. This Act goes further than any of the previous Acts. It contains in section 110 words which are not to be found in the other Acts. Section 111 is a repetition of the previous Acts, and refers to the ground vested in the Burgher Senate, but section 110 expressly vests in the Council all lands, streets, roads, and public places to which the inhabitants of the municipality have acquired a common right, and adds "and in the Green Point Common in so far as it is situated within the municipality," as well as of certain portions of the foreshore. Now, neither the common nor the foreshore were specifically mentioned in the previous Acts, and I read this section as removing any doubt which might possibly before have existed as to whether or not the Green Point Common was vested in the Town Council. Since this Act of 1893 it is clear, I think, that the Parliament of the country has vested the common in the Town Council. The question then arises, is the portion of ground now in question part of the Green Point Common? In the court of first instance evidence was led showing that this land had been so regarded by the public for a number of years, and there is evidence of long user on behalf of the inhabitants of this particular ground. In the plaintiff's declaration there is a claim of prescriptive rights, but it is not a claim to the dominium of the ground in question, but only of the right of use thereof. The evidence led in support of this right, I think, is useful in this case, and was so found by the court of first instance, as showing that the ground in question was part of the Green Point Common situate within the municipality. If that evidence is satisfactory as showing

that it is part of the common within the municipality, then it seems to me to indisputably follow that section 110 vests this ground in the Corporation of Cape Town. It is said that certain acts were permitted and suffered by the Town Council, and that certain rights were exercised by the Government, which were inconsistent with the right of property now set up. But even if those acts were inconsistent with the rights of the municipality, that does not cancel the Act which transferred the property to the municipality. It may be that the municipality, after the passing of the Act, was not fully aware of the rights conferred upon it. But there is nothing to show why the Court should read this Act in any way otherwise than as the words actually used by the Legislature evidence its meaning. It may well be argued that this very land in question was by the various earlier statutes vested in the municipality before the Act of 1893 was passed; but I think, after the passing of the Act of 1893, there can be no doubt whatever that the Parliament of this country has transferred this Government property which was within the municipality, and over which a servitude was created in favour of the Ordnance officials, to the municipality. His Lordship the CHIEF JUSTICE, in giving judgment, said that while it would be declared that this land was the property of the Council, the interests of all parties would be safeguarded, and his declaration was coupled with the condition that the ground was granted to the municipality subject to the servitude in favour of the Imperial Government. It seems, therefore, no injustice was done. All rights have been carefully safeguarded; and, with the Acts before us and with the different statements as to the user of this property, I think there can be no doubt that the decision of the court of first instance is correct, and that this appeal cannot be allowed. The appeal must be dismissed with costs.

MAASDORP, J., and HOPLEY, J., concurred.

Appeal dismissed accordingly, with costs.

[Appellants' Attorneys, REID & NEPHEW.
Respondents' Attorneys, FAIRBRIDGE, ARDERNE & LAWTON.]

REX *vs.* HOFFMANN.

REX *vs.* SAACHS AND HOFFMANN.

Accomplice—Evidence—Corroboration—Ordinance No. 72, 1830—Brandstichting—Arson.

Ordinance No. 72, of 1830, *section* 12, *enacts that it shall be competent for any Court or Jury to convict any person of any crime charged, on the single and unconfirmed evidence of an accomplice; provided always that such crime shall, by competent evidence, other than the single and unconfirmed evidence of such accomplice, be proved to have been actually committed. If, therefore, there is sufficient evidence* aliunde *of the commission of a crime, it is not necessary to have corroboration of the accomplice's statement connecting the accused with the crime; though in practice it is usual for the Judge presiding at the criminal trial to caution the jury against convicting on the evidence of an accomplice, unless there is some corroboration upon material facts.*

On the trial of the appellants for arson, two accomplices, who had already been convicted, gave evidence that they had been employed by appellants to set fire to the house, and there was the independent evidence of two constables that there were clear indications of the fire having been wilfully caused. Held, *that there was not sufficient ground for disturbing the verdict of guilty found by the jury.*

Setting fire to a man's own house with intent to defraud or otherwise injure an insurance company, constitutes the crime of "brandstichting," or arson.

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In the first case, the appellant Hoffmann and another had been charged at the May Criminal Sessions with the crime of arson. Hoffmann was convicted and sentenced to four years' imprisonment, with hard labour. At the request of his Counsel the presiding Judge, MAASDORP, J., reserved the following questions for the consideration of the Court of Appeal in criminal cases, *viz.*:

1. Whether by the law of the Colony as it at present

stands, a conviction can be sustained on the uncorroborated testimony of accomplices other than the corroboration of the fact that a crime has been committed ?

And if this question be decided against the prisoner :

2. Whether there is upon the record such evidence as corroborative evidence ?

3. Whether secondary evidence of the contents of the insurance policy should have been admitted under the circumstances proved ?

In the second case the appellants, Saachs and Hoffmann, had been convicted at the same sessions on an indictment charging the crime of attempting to commit the crime of arson, and were convicted. The crime was laid in respect of other premises, but the accomplices were the same in both cases. The accomplices had been themselves convicted on a charge of arson in the first case, and on a charge of housebreaking with intent to commit the crime of arson in the second case. The first two points reserved were taken in the second case.

Sir H. Juta, K.C. (with him *Upington*), for the appellants, relied on the contradictions between the evidence of the accomplices and the evidence of the other Crown witnesses. There was no corroboration of the accomplices' statements implicating the prisoners. By English practice there must be such corroboration.

[DE VILLIERS, C.J. : Ordinance No. 72, of 1830, expressly provides for this.]

In speaking of the corroboration of the accomplice that a crime was committed the legislature had the English practice in view. There had been some difference of opinion stated in the various decisions on the construction to be put on the Ordinance. (*R.* vs. *De Kock*, 1 Roscoe, 441 ; *R.* vs. *Diedrich*, 3 H. C. R., 359 ; *R.* vs. *Bitterbosch*, 3 H. C. R., 494 ; *R.* vs. *Swartz*, 6 Sheil, 702 ; *R.* vs. *Malatunga*, 20 S. C. R., 425 ; *R.* vs. *Chartris*, 21 S. C. R., 440 ; *R.* vs. *Matjolweni*, 21 S. C. R. 368 ; *R.* vs. *Adams*, 4 Sheil, 122.) In the second case no overt act had been proved, and consequently no attempt to commit the crime charged had been substantiated.*

* See *Rex* vs. *Saachs and Hoffmann*, post, p. 347.

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Howel Jones, for the Crown, submitted that the point now taken in the second case had never before been raised, and had not been reserved. The evidence showed sufficient corroboration of the statement that the crimes charged had been committed.

Sir H. Juta, K.C., in reply, submitted that the connection of the accomplices of housebreaking with intent to commit arson was no proof of any overt act on the part of the present accused.

DE VILLIERS, C.J., said: In the case of William Hoffmann the following questions were reserved: "(1) Whether by the law of the Colony, as it at present stands, a conviction can be sustained upon the uncorroborated testimony of accomplices other than the corroboration of the fact that a crime has been committed." I think the form in which the question should have been put is not quite correct for it should have been said, "the crime has been committed," and in that form it will be answered. "And in case the first question is decided against the prisoners, (2) whether there is upon the record such evidence as corroborative evidence." That is again rather awkwardly put, but I take the question to mean this, whether there is upon the record corroboration of the fact that the crime has been committed." "(3) Whether secondary evidence of the contents of the insurance policy should have been admitted under the circumstances proven." As to the first question, the best answer is to quote the terms of section 12 of Ordinance 72 of 1830: "And be it further enacted and declared, that it shall and may be lawful and competent for any Court or jury in any case which shall and may be lawfully tried by such Court or jury respectively, to convict any person who shall be tried before any such Court or jury, of any crime or offence charged in the indictment, information, or complaint under trial, on the single evidence of any such accomplice as aforesaid. Provided always that such crime or offence shall, by competent evidence, other than the single and unconfirmed evidence of such accomplice, be proved to the satisfaction of such Court or jury respec-

tively to have been actually committed." Sir *Henry Juta* wishes the Court, in fact, to read this proviso as if the words had been added, "actually committed by the accused." Now, that is not what is said by the legislature, and not a single case has been cited in which it has been held that this corroborative evidence must be evidence to the effect that the accused committed the crime. The Court has continually decided here that it is sufficient to prove that the crime which has been mentioned in the indictment has been committed. The cases which have been relied upon by Sir *Henry Juta* do not, in my opinion, support his contention at all. In the case of *Regina* vs. *De Kock* (1 Roscoe, 441), I think the remarks of the CHIEF JUSTICE clearly show that he took the same view which the Court has afterwards taken. There the appellant was a sheep owner, and two of his shepherds were accused by him of taking, one a sheep and the other a goat. They gave information that the appellant, on the mountains, in 1865, caught two stray sheep and marked them with his own mark. One Morkel gave evidence that he lost sheep on the mountains in 1865. If Morkel had given evidence that the sheep which were found afterwards with the mark of the accused were sheep which had been stolen from him, the case would have been in point. The CHIEF JUSTICE, however, was of opinion that the unsupported evidence of accomplices should not be taken as proof of the committal of a crime, and the evidence of Morkel should not be considered as any corroboration. In the case of *Queen* vs. *Bitterbosch* the learned JUDGE PRESIDENT there said: "Had these prisoners been tried before a jury, the Judge would have warned them that it was unsafe to convict on such evidence. And because in such a case the jury would have acquitted, the learned JUDGE PRESIDENT held that as this was a case before a Resident Magistrate, the judgment should not be confirmed, and Mr. Justice LAURENCE also thought it was the duty of the Magistrate, as a Judge, to warn himself, as a juror, that it was unsafe to convict on such evidence as he had before him. He does not say that it would have been illegal for a jury so to convict. The warning mentioned by him is invariably given by judges where

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the conviction depends upon the evidence of accomplices, but it has always been held by this Court that, as a matter of law, the jury may convict provided that evidence *aliunde* is given to prove that the crime charged in the indictment has been actually committed by someone. Such was the effect of the decision of a full Court of three Judges in *Regina* vs. *Schwartz* (6 Sheil, 102), and it is really too late to question the correctness of that decision. Coming to the question raised in the present case, whether there is clear proof that the crime charged against William Hoffmann has been actually committed, well, upon this point we have, first of all, the evidence of Bisset, of the Fire Brigade, who says it was evident there had been a deliberate attempt to burn this place, and who speaks as to finding bundles of matches upstairs. Then there is the evidence of Grant, the detective head constable, who also was at the fire. He said he noticed footprints and bundles of matches, and oil on the ground and rags attached to the goods with the apparent object of setting them on fire. Part of the things were actually burnt, and traces of the arson were found in other parts.

This evidence is quite independent of the evidence of the two accomplices, Kline and Bailey, so that the second question also raised in this case must be answered against the accused. Then there is the third question, as to the insurance policy. Well, I do not think it is necessary to go into that question at all, because evidence of the insurance policy was not required. This was a case in which the accused was charged in the indictment as amended with setting fire to a certain house there situate and in the estate of the late Annie Sarah Hall, and it was therefore not necessary for the purposes of conviction in that case to prove that it was done for the purpose of the insurance at all. Where a person attempts to set fire to the house of another person he is guilty of an attempt to commit arson, whether there is any intent to fraudulently obtain insurance money or not. Where a person burns his own house, the question whether he is guilty of "brandstichting," or arson, must, under our law, depend upon the further question whether the deed was done with the object of injuring others (*Van der Linden*,

2, 4, 7). If the object be to defraud an insurance company the intent would certainly be to injure another so as to bring the offence within the definition. But here the house itself belonged to another person, although the goods inside belonged to the appellant. The two first questions must be decided against the appellants.

BUCHANAN, J., and HOPLEY, J., concurred.

Questions reserved decided accordingly against the accused, and conviction affirmed.

[Appellant's Attorney, DU TOIT.]

REX *vs.* SAACHS AND HOFFMANN.

Accomplice—Corroborative Evidence—Arson.

On a trial of the appellants for an attempt to commit the crime of arson, two witnesses, who had already been convicted, swore that they had been employed by the accused to set fire to the house. A police constable deposed that he had seen one of the two witnesses at the time of the attempt enter the house with some parcels and then come out again with the parcels, which on his being then and there arrested were found to contain tins of benzine, while the other witness had been watching outside the premises, and the accused, as well as other witnesses for the defence, admitted that an attempt to commit the crime of arson had been actually committed by some one. Held, *on a question reserved, that there was corroborative evidence that the crime had been committed, so that there was not sufficient ground for disturbing the conviction of the appellants by the jury.*

After the conclusion of the case of *Rex* vs. *Hoffmann* (*ante*, p. 342) this case stood over to enable the Court to re-peruse the evidence. No further arguments were heard.

DE VILLIERS, C.J., in giving judgment, said: In this case, at the trial before my Brother MAASDORP, at the

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request of Mr. *Upington*, Counsel for the prisoners, the Court reserved the following questions of law for the consideration of the Court on appeal in criminal cases: "(1) Whether the appellants could be convicted on the evidence of an accomplice alone, uncorroborated, by any evidence except evidence that the crime had been committed; (b) whether there was corroborative evidence of the fact that the crime had been committed." As to the first question, that has already been disposed of in the case of William Hoffmann, in which the Court gave judgment at the hearing on Tuesday last. [After quoting from the evidence of Police Constable Lambourne, his Lordship proceeded.] There can be no doubt that these two convicts, Kline and Bailey, had the benzine in their possession and that they had carried it into the house at night-time, and the jury probably concluded that the reason why they left the house again was because they believed they were watched. There is the undoubted fact that these two men have been convicted of the offence of attempting to commit arson, and then when we refer to the evidence given by the witnesses for the defence in this case, there is on the part of every one of them an admission that there was an attempt to commit arson on the night in question. There is the evidence of Hoffmann himself, one of the accused. Now, the question is whether, where the accused themselves and the witnesses for the accused assumed throughout that the offence had been committed, the Court should now hold that the jury were not justified in saying "it is proved to our satisfaction that the offence was committed." I do not think that the Act of 1896 would justify the Court of Appeal in interfering with the verdict of the jury in such circumstances. Of course, if there were no evidence whatever which would justify any jury in concluding that the particular offence had been committed, the Court would be justified in interfering, but where there is evidence from which it might reasonably infer that the offence has been committed, the Court should not now interfere with the verdict of the jury. The proviso to section 12 of the Ordinance (No. 72 of 1830) clearly leaves the matter to the decision of the jury. The proviso is as follows: "Provided always that such

crime or offence shall, by competent evidence, other than the single and unconfirmed evidence of such accomplice, be proved to the satisfaction of such Court or jury respectively to have been actually committed." In this case I am informed by the learned Judge who presided at the trial that he impressed upon the jury how unsafe it was to convict upon the evidence of two witnesses, who, according to their own account, had a most disreputable character. In spite of that warning the jury convicted, and I think that, as there was evidence to justify the jury in concluding that the offence of attempted arson had been committed, this Court should not interfere with this verdict. The appeal will, therefore, be dismissed. His Lordship added that Mr. Justice BUCHANAN agreed in this judgment.

HOPLEY, J., in concurring, said: I am of the same opinion. In the present case the evidence on the record that a crime had been committed was very slight, but the fact remains that, without reading the evidence of the accomplices at all, both for the prosecution and the defence, the witnesses speak of this attempted fire as an admitted fact, a fact that everybody admitted. Both Honikman and another Crown witness speak of an attempt to fire the premises in Burg Street on that date, and there is this fact, that such statements were not subjected to any cross-examination. When one turns to the evidence for the defence, Hoffmann himself treats it as an admitted fact that there was a fire attempted at this place. There is this further fact, that those two men, Kline and Bailey, were seen in the yard at night with tins of benzine in their possession.

Appeal dismissed accordingly, and conviction affirmed.

[Appellants' Attorney, DU TOIT.]

CAPE DIVISIONAL COUNCIL *vs.* MARAIS.

Divisional Council Rates—Act No. 40, 1889—*Receipt—Transfer of Property.*

Where several years' rates which have been levied on certain landed property within a division remain due and unpaid, on the sale of such property the Divisional Council cannot, on the ground that the previous years' rates are not also tendered, legally refuse to receive from the purchaser of the property only the rates last due, a receipt for such last due rates being necessary, under section 275 *of Act No.* 40, 1889, *to be produced to the Registrar of Deeds before transfer of the property sold can be effected to the purchaser.*

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Cape Divisional Council *vs.* Marais.

This was an appeal from an order of a Divisional Court, obtained by the respondent, Marais, which required the appellants, the Cape Divisional Council, to accept from the respondent payment of the Council's rates last due upon certain property purchased by respondent from one, Pinkus, and to grant a receipt or certificate of the payment of such rates. The reasons for the judgment given by the Divisional Court Judge, BUCHANAN, J., were as follows:

In March last one Pinkus, registered owner of certain landed property, sold the same to the present applicant Marais. Marais, on attempting to get transfer, found that the Divisional Council rates levied during the last two years had not been paid. He therefore tendered to the Divisional Council payment of the rate which had been levied during the last year only upon the property. This tender the Divisional Council refused to accept, because the rates for the previous year had not been paid by Pinkus. Prior to the passing of the Divisional Council Act No. 40 of 1889, it was not necessary that the Divisional Council rates should be paid before transfer of any property was effected, but that Act, for the purpose, no doubt, of giving divisional councils some security, imposed the condition contained in section 275, which enacts that "before the passing transfer of any immoveable property within any division, every registrar of deeds shall require the production of a receipt or other voucher showing that the rates last due to the Council of such division upon such property have been paid." This section differs from that of the Cape Town Municipal Act. There are also several differences between this case and that of *Smuts* vs. *Cathcart Divisional Council* (13 S. C. R., 359), which has mainly been relied on in argument for the applicant. In that case there was a sale

in insolvency, and after the sale in insolvency, but before transfer, a rate had been levied, and it was held that the purchaser of the property was not bound to pay anything more than the rates which had been incurred during his occupancy of the property. Here, however, the last rate has not been levied since the sale of the property, and *prima facie* the purchaser was not liable for any rates, but I do not see that this fact makes any conflict between the two cases. Had this rate been levied after the sale of the property, it is admitted that the case of *Smuts* would apply, and there would be no ground for the refusal of the Divisional Council to accept payment of the last year's rate from the applicant. But it is said that because the rate was due before the sale of the property, therefore the purchaser is not entitled to pay the last rate due by the previous owner without also paying the arrears due by such owner. Great reliance has been placed upon a remark by his Lordship the Chief Justice in the case of *Smuts*, that the Divisional Council would not be bound to accept from the owner of the property the last year's rates when such owner also owed the previous year's rates. That may be the case as between the previous owner and the Council, but the Council cannot on that account prevent the purchaser of the property from obtaining transfer. The Divisional Council Act does not say that a receipt for all rates due must be produced, but limits the receipt required to that for the rates last levied. It can only be read, therefore, as giving a security, or lien, or whatever you like to call it, for the rates last due. Mr. Marais has now purchased the property, and offers to pay those rates which it is necessary should be paid before he is able to obtain transfer. I think there is no reason why the application should not be granted. It is said that a tender coupled with a condition for a receipt being given is not a good tender. However that may be, where a statute requires a receipt to be produced from a public body like the Divisional Council, I think it is the duty of such body to give such receipt upon payment to them of the amount they are entitled to demand. The application will therefore be granted, as prayed, with costs.

Against this order the Divisional Council now appealed.

Benjamin, for the appellants, referred to the several sections of the Divisional Councils Act No. 40, 1889, which were in point. Section 275 required the "rates last due to the Council" to be paid before transfer was allowed to pass. Section 269 entitled the Council to sue for the recovery of rates either the owner, lessee, or occupier of the property. The only decided case on section 275 was that of *Smuts* vs. *Cathcart Divisional Council* (13 S. C. R., 359), where a purchaser of land was held liable only for rates which had accrued during his occupation. That decision did not apply to this case, but the *dictum* of DE VILLIERS, C.J., that "if the rate last due

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is tendered by the person owing the previous rates, the Council may certainly refuse to accept it," did apply. All the arrear rates in this case were payable by Pinkus. There was no liability whatever on Marais.

[DE VILLIERS, C.J.: Is the tender made on behalf of Pinkus?]

Yes.

[No. Marais tenders as he wants transfer.]

But Marais is neither owner, lessee, nor occupier. The only person who can pay the rates is Pinkus. Marais can only tender payment on behalf of Pinkus, and a creditor cannot be compelled to accept payment from one who is not liable unless he tenders the whole amount due. (*Voet*, 46, 3, 11.)

[DE VILLIERS, C.J.: Is it clear that Marais is acting on behalf of Pinkus? Is not Marais acting quite independently?]

There must be a legal liability on Marais' part. In *Smuts'* case the last rate due was tendered by a person who had himself incurred liability only for that rate. (*Pothier on Contracts*, 3, 1, 1, 463.)

Upington, for the respondent, submitted that Marais had an interest in the property as purchaser, and made the tender on his own behalf. (*Bousfield* vs. *Divisional Council of Stutterheim*, 19 S. C. R., 64. *Et vide Voet*, 36, 3, 1; *Pothier on Oblig.*, sec. 464; and *Dig.*, 46, 3, 72, discussed in that case.)

[DE VILLIERS, C.J.: In that case all the arrear rates were paid.]

The case is cited to show that a person having a *bonâ fide* interest can compel the Council to receive the rates from him. This was a divisible debt, the rates being levied for each year. (*Riversdale Divisional Council* vs. *Pienaar*, 3 Juta, 252; *Bertram* vs. *Wood*, 10 Juta, 177.)

Benjamin replied.

DE VILLIERS, C.J., in giving judgment, said: The applicant bought the land now in question from one Pinkus, and at the time of the purchase arrear rates were owing by Pinkus to the Divisional Council. The appli-

cant thereupon tendered to the Divisional Council the rate which last became due, and asked for a receipt for the amount. The Divisional Council refused to accept the amount unless the arrear rates were also paid. It is quite clear that, before the passing of the Divisional Councils Act of 1889, the applicant would have been entitled to receive transfer of the property without giving any proof that any Divisional Council rates had been paid. Until the passing of that Act, the Divisional Council had no tacit hypothecation in any shape or form over any portion of the rates. Section 275 of the Act, however, does give the Divisional Council a hold on the land, but only in respect of the last year's rate (section read). It is unnecessary, for the purposes of the present case, to decide whether Pinkus could have tendered the last year's rate without tendering all arrears due. There was a *dictum* in the case of *Smuts* vs. *Cathcart Divisional Council* (13 S. C. R., 359), which would be somewhat opposed to his having such a right, but the question does not now arise, because no tender was made on behalf of Pinkus, but the tender was made on behalf of the applicant, the person who purchased the property. He has a very important interest in the matter, because he is the purchaser of the property; he is the person who seeks to obtain the transfer, and who is in no way to blame for the non-payment of the arrear rates. For such non-payment the Council is more to blame than the appellant, but if the contention of the Divisional Council were to prevail, the effect would be that the Council would have a kind of lien in respect of arrear rates in every case except in a case like that of *Smuts* vs. *Cathcart Divisional Council*, where the person who tenders the rates is the one who has been in occupation during the last year. The Act assumed that there would be vigilance on the part of the Divisional Councils of the country in the collection of rates, but protected them in respect of the rates last due on land sought to be transferred. This protection would be practically extended to all arrear rates if the *bonâ fide* purchaser of land is not to have a receipt on payment of the rate last due.

Upon the whole, I come to the conclusion that the applicant has sufficient interest in the matter to take

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advantage of section 275, and to claim that, upon payment by him of the last year's rates, a voucher shall be given to him so as to enable him to get the benefit of section 275, viz., to obtain transfer of the property from the Registrar of Deeds. For these reasons, I am of opinion that the appeal must be dismissed, with costs.

MAASDORP, J., and HOPLEY, J., concurred.

Appeal dismissed accordingly, with costs.

[Appellants' Attorneys, W. E. MOORE & SON.
Respondents' Attorneys, SYFRET, GODLONTON & LOW.]

APPENDIX.

HILLS *vs.* COLONIAL GOVERNMENT.

Contract—Actual Cost—Interest—Liquidated Damage—Penalty.

Interest on payments is not included under "actual cost," in a contract for the construction of a line of railway.

The criterion whether a sum—be it called "penalty" or "damages"—is truly liquidated damages, and as such not to be interfered with by the Court, or is truly a penalty which covers the damage if proved, but does not assess it, is to be found in whether the sum stipulated for can or cannot be regarded as a genuine pre-estimate of the creditor's possible interest in the due performance of the principal obligation. The indicia *of this question will vary according to circumstances. Enormous disparity will point one way, while the fact of the payment being in terms proportionate to the loss, will point the other. But the circumstances must be taken as a whole, and must be viewed as at the time the bargain was made.*

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The following is the judgment of the Privy Council on the consolidated appeal and cross-appeal of *The Commissioner of Public Works, and, as such, representing the Colonial Government* vs. *Hills**; and of *Hills* vs. *The Commissioner of Public Works, and, as such, representing the Colonial Government,*† from the Supreme Court of the Colony of the Cape of Good Hope, delivered by

Lord DUNEDIN‡:—The present appeals arise out of three contracts which were made between the Government of the Cape of Good Hope and The Thames Ironworks and Shipbuilding Co., ltd. Arnold Frank Hills, the respondent in the principal appeal and appellant in the cross-appeal, has been assigned into the rights of the said Company.

* Reported as *Colonial Government* vs. *Hills*, 20 S. C. R., 292.

† Reported as *Hills* vs. *Colonial Government*, 20 S. C. R., 107 and 416.

‡ Present at the hearing: The LORD CHANCELLOR, LORD DAVEY, LORD DUNEDIN, LORD ATKINSON, and SIR ARTHUR WILSON.

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These three contracts were all made on the same day, 4th July, 1900, and were subsequently confirmed by Act of Parliament of the Cape of Good Hope, where they appear as Schedules G, H, and I of Act 19 of 1900. They had to do with the construction of three railways, viz. :—No. 1, Oudtshoorn-Klipplaat; No. 2, Somerset East-King William's Town; and No. 3, Mossel Bay-Oudtshoorn. The first two were contracts for the construction of the lines of the Company and the handing over of them to the Government. They were constructed and handed over, and no question, in one sense, arises on them. But moneys payable under them are partly the subject of this litigation, for the following reason. In each of them there was a clause providing that 10 per cent. should be retained by the Government from the payments falling due as the lines were constructed, and each of them also contained clauses dealing with the ultimate fate of the 10 per cent. so retained. By these clauses the 10 per cent. retained from each instalment was to form a guarantee fund, which fund was to be primarily applied to making good any defects of construction, and then "the guarantee fund or the balance thereof shall be dealt with in terms of the agreement entered into for the construction of the Mossel Bay-Oudtshoorn line."

Under these clauses sums amounting *in cumulo* to £61,233 16*s*. 2*d*. have been retained.

The third contract, which related to the Mossel Bay line, was rather different. This line was to remain the property of the contractors, but in respect of their engaging to construct the line the Government was to pay them a subsidy at the rate of £2,000 per mile of completed railway, not to exceed £150,000 in all. Provision was made for the payment of this subsidy as the work went on, but subject to the retention of 10 per cent. of it by the Government.

A sum of £50,000 had been lodged as security by the company in the hands of the Cape Agent-General, and section 15 of schedule I, provides that this sum and the sums retained by way of 10 per cent. of the instalments out of the payments on lines (1) and (2) should be handed over to the company as follows, viz., one-

third when the Mossel Bay line had been completed to a certain geographical point, one-third when to a certain further point, and one-third on final completion.

Then comes section 17, on which the controversies in these appeals directly turn. It is in the following terms:

17. The concessionary undertakes to push forward the construction of the line with all possible speed and to complete the same within two years of the date of the approval of this agreement by Parliament. In the event of the non-completion of the line within the time hereinbefore mentioned, unless the delay is proved to the Commissioner of Public Works to have been caused by the act of God, war, insurrection, rebellion, strikes, lock-outs, or combinations of workmen, or other extraordinary or unforeseen circumstances, beyond the control of the concessionary, or from or on the part of the railway department, the security referred to in this agreement to wit:—

The ten per cent. (10 %) retention money under this agreement, together with the ten per cent. retention money under the agreements for the construction of the Oudtshoorn-Klipplaat and the Somerset East-King William's Town Lines, dated 4th July, 1900, and the security lodged with the Cape Agent-General shall be forfeited to the Colonial Government as and for liquidated damages sustained by the said Government for the non-completion of the said line, and thereupon the agreement between the Government and the said concessionary shall cease and determine, and it shall be lawful for the Government to enter upon and take possession of such incomplete line of railway as has been constructed by the said concessionary, and the Government shall thereafter as soon as the amount of the actual loss of such incomplete line shall have been ascertained pay to the said concessionary the amount so ascertained less such amount as shall have been paid on account of subsidy and less the amount of retention money and security hereinbefore referred to.

The company failed to complete the line within the two years, or within a period to which the two years had been by mutual consent extended. They did not even advance with it so far as to be able to claim any of the partial payments under section 15. Accordingly, on 15th June, 1903, the Government applied to the Court to get a declaration of the failure of the company to complete the line, and for leave to enter upon and take possession of the line in terms of section 17. The Court gave judgment accordingly. Against that judgment an appeal was taken, but subsequently abandoned, and the judgment now stands as final between the parties.

The company, who by this time were represented by the present appellant Hills, then brought the present

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action against the Government, asking for payment of the value of their line, and the handing over of the sums retained and of the sum of £50,000 above mentioned, as also of a sum of £4,913 2*s.* 5*d.*, being 10 per cent. of the instalments of the subsidy retained on railway No. 3. The Court gave judgment in favour of the plaintiff for a sum of £73,500 12*s.* 7*d.*, being the actual cost of the works as found by referees to whom it had remitted the question (but with no allowance for interest on capital), under deduction of the said sum of £4,913 2*s.* 5*d.*, and also gave judgment for the plaintiff for the sums of £66,146 18*s.* 7*d.* (made up of the said sums of £4,913 2*s.* 5*d.* and £61,233 16*s.* 2*d.*) and £50,000.

The parties in the principal appeal do not raise any question as to the sum of £73,500 12*s.* 7*d.*, but in the cross-appeal the appellant Hills prays for a further addition in name of interest on capital. On this point their Lordships entirely agree with the remarks of the learned CHIEF JUSTICE. To add interest would seem to them to disregard the plain meaning of the word "actual" as applied to cost. The referees have here, as practical men, found the cost of the works—in other words, they have said that so much money was expended in order to make them. To add something more in name of interest would be to add something which never could be actual cost, for it would either be a sum calculated on an assumed general rate of interest, or it would be a sum which varied according to the financial position of the particular contractor. That "actual cost" in this contract is used in no such fanciful sense is clearly shewn by the use of the words in section 7 of schedule I, where provision is made for its ascertainment as regards each instalment by the certificate of an engineer.

This disposes of the cross-appeal. In the principal appeal the Government has complained of the judgment in so far as it gives the respondent Hills the sums of £66,146 18*s.* 7*d.* and £50,000, and claims these in terms of section 17 as being theirs in name of liquidated damages for non-completion of the line within the specified time.

Their Lordships have no doubt that the case of the non-completion of a railway would be a natural and

proper case in which to make such a stipulation. But the question arises in each particular case whether such a stipulation has been made, and it is well settled law that the mere form of expression "penalty" or "liquidated damages" does not conclude the matter. Indeed, the form of expression here "forfeited as and for liquidated damages," if literally taken, may be said to be self-contradictory, the word "forfeited" being peculiarly appropriate to penalty and not to liquidated damages.

The House of Lords had occasion to review the law in the matter in the recent case of *The Clydebank Engineering and Shipbuilding Co.* vs. *Don Jose Ramos Yzquierdo y Castaneda* (1905 A. C., p. 6). It is, perhaps, worthy of remark, in view of certain observations of the learned CHIEF JUSTICE in the Court below, that that was a Scotch case, that is to say, decided according to the rules of a system of law where contract law is based directly on the civil law, and where no complications in the matter of pleading had ever been introduced by the separation of common law and equity.

The general principle to be deduced from that judgment seems to be this, that the criterion of whether a sum—be it called penalty or damages—is truly liquidated damages, and as such not to be interfered with by the Court, or is truly a penalty which covers the damage if proved, but does not assess it, is to be found in whether the sum stipulated for can or can not be regarded as "a genuine pre-estimate of the creditor's probable or possible interest in the due performance of the principal obligation." The *indicia* of this question will vary according to circumstances. Enormous disparity of the sum to any conceivable loss will point one way, while the fact of the payment being in terms proportionate to the loss will point the other. But the circumstances must be taken as a whole, and must be viewed as at the time the bargain was made.

Applying this principle to the present case, their Lordships are unable to come to the conclusion that the sum here can be taken as a genuine pre-estimate of loss. The determining factor is that the sum is not a definite sum, but is liable to great fluctuation in amount dependent on events not connected with the fulfilment of this

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contract. It is obvious that the amount of retained money under contracts 1 and 2 depended entirely on the progress of those contracts, and that, further, as those moneys are primarily liable to make good deficiencies in these contract works, the eventual sum available to be dealt with under the provisions of section 17 of this contract could not in any way be estimated as a fixed sum.

Their Lordships therefore hold that the sums are not liquidated damages under section 17.

So far as a claim is made under section 16 for £10,000, there seems no ground for argument that the sum is liquidated damages, as the expression used points to forfeiture pure and simple.

Their Lordships are not, however, satisfied that the Government has been given a proper opportunity to prove such damages, not exceeding the sums in the penalties, as they can make out. In the Court below the whole contention seems to have turned upon the question of liquidated damages, yea or nay. The judgment of the learned CHIEF JUSTICE which decides—as their Lordships think, rightly—that the damages are not liquidated, does not directly deal with the question of damages, unless certain remarks are held to lay down the proposition that in such a contract the Government, as a Government, could suffer no damage. Their Lordships do not take that view. That the Government had a true and valuable interest in getting a line constructed, even although when constructed it was not to be their property, seems to be sufficiently established by the fact that they were content to pay a subsidy of £2,000 a mile. They have not got that line completed, but, on the contrary, have got on their hands an incomplete line, incapable of yielding profit in its present state, but for which they have been obliged to pay a considerable sum of money. It seems to their Lordships that there are obvious elements of damage in such a position, and that the Government should be given the opportunity of proving such damage and evaluating it in money.

Their Lordships will therefore humbly advise His Majesty to declare that before the plaintiff (the respondent in the principal appeal) obtains judgment for the sums of £66,146 18*s.* 7*d.* and £50,000 awarded to him by the

judgment of the Supreme Court dated 29th February, 1904, the defendant (the principal appellant) is entitled to prove such damage as he may have actually suffered through the plaintiff's breach of contract, and to obtain judgment in reconvention for such amount to be deducted from the sums awarded to him by the judgment of the Supreme Court, and that subject to such declaration the defendant's appeal ought to be dismissed, and further, that the plaintiff's cross appeal ought to be dismissed.

The parties will pay their own costs of the appeal and cross appeal respectively.

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